314 U.S. 683, 1
(22)

Office - Supreme Court, U. S.
FILED
OCT 4 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 682

DANIEL W. HOAN,

Petitioner,

vs.

THE JOURNAL COMPANY, HARRY J. GRANT AND LAWRENCE C. EKLUND,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN, U. S. A.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN AND BRIEF IN SUPPORT THEREOF.

FRANCIS E. McGOVERN,
Counsel for Petitioner,
606 W. Wisconsin Ave.,
Milwaukee, Wisconsin.

THE SMITHROP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

INDEX TO PETITION.

PAGE

I. Summary Statement of Matter Involved..... 2

1. Amended complaint of petitioner in trial court 2

2. A trial was had before the court and a jury and on the demand of respondents a special verdict was submitted to and returned by the jury in which every question, 12 in all, was answered favorably to this petitioner. Thereupon respondents moved to change the answers of the jury to the first two questions of the verdict from "yes" to "no" contrary to all law and precedents; and on appeal said unauthorized and prohibited action of the trial judge the Supreme Court of Wisconsin affirmed said departure from lawful procedure and regardless of the rights of petitioner as a natural born citizen of the United States and subject to its jurisdiction denied his claim to protection under the first section of the Fourteenth Amendment to the Constitution of the United States of equal protection of the laws, thus grievously discriminating against him 2-3

3. The gist of the libel sued on..... 3

4. What the word "bombings" in this case means 3

5. Stipulation of all parties in open court on the subject of the bombings..... 4-6

6. This proof established beyond question the perpetrators of the bombings and the innocence of petitioner. The libel transferred the blame from the real culprits to petitioner 7

7. What crimes were embraced in the libel... 7-9

8. Special verdict submitted to the jury and returned with every answer in favor of petitioner 9-10

The Supreme Court on motions after verdict sustained and affirmed the unlawful and prohibited action of the trial judge in changing the answers to the first two questions of the verdict from "yes" to "no", though the findings of the jury were abundantly supported by credible evidence and there was no credible proof to the contrary..... 10

II. The Supreme Court of Wisconsin in approving and affirming the unlawful, arbitrary and unauthorized conduct of the trial judge in totally disregarded Questions 3 to 12 inclusive of the special verdict and the answers of the jury thereto 11

1. These answers and questions stand in the record unimpaired as verities in the case and constitute ground for judgment in favor of petitioner 11

2. But though requested on the ground of violation of petitioner's right under the first section of the Fourteenth Amendment to the Constitution of the United States, the Supreme Court of Wisconsin denied petitioner's requests for such protection and relief on wholly untenable grounds as shall appear by petitioner's brief..... 11

3. Such action by said Supreme Court was and is unauthorized and by law prohibited 11

4. In the light of its proper setting the language of the libel is unmistakable..... 12

5. The crimes charged in the libel and attributed to petitioner were published by respondents was at the height of public excitement 12

6. The Supreme Court of Wisconsin arbitrarily approved the unauthorized and prohibited action of the trial judge in nullifying both branches of the verdict in petitioner's favor 12

7. Each of these glaring, illegal and unauthorized actions of the Supreme Court of Wisconsin constitutes a separate invasion of the rights of petitioner to equal protection of the law as claimed by him under the first section of the Fourteenth Amendment to the Constitution of the United States....12-13

8. The right of petitioner to the protection of the federal constitution was considered by the Supreme Court and on motion for rehearing was denied with costs..... 13

III. The Supreme Court of Wisconsin is the highest court of law or equity in the State Wisconsin... 14

1. By its inclusive departures from settled law and practice it invaded in two distinct ways the constitutional rights of petitioner under the first clause of the Fourteenth Amendment to the Constitution of the United States:

a. Arbitrarily and unlawfully sanctioning the change of the answers to the first two questions of the special verdict from "yes" to "no"..... 15

b. Its evasion of the validity of the findings of the jury in questions and answers 3 to 12 inclusive..... 15

IV. This court is not without power to rectify the denial of petitioner's rights under the Constitution of the United States..... 15

1. The first section of the Fourteenth Amendment to the Constitution of the United States of equal protection of its laws in the case of natural born citizens subject to its jurisdiction is not self-enforcing.....15-16

2. In cases such as the one here presented, unless petitioner's rights are vindicated by this court he will be wholly without remedy 16

3. In perfect harmony with the conclusion drawn from the language of the constitution itself is statutory provision authorizing the issuance of a writ of certiorari to vindicate rights of citizens under the national constitution situated as is petitioner in this case 16

4. Act of Feb. 13, 1925, Chap. 229, 43 Stats. 936, and one of the rules of this court so provides 16-17

5. The claim of petitioner to protection against invasion of his right as a natural born citizen of the United States and subject to its jurisdiction was raised as soon as it was known to him or could be anticipated that the Supreme Court of Wisconsin disregarded his appeal to protection under the Federal Constitution in the way it has done in this case..... 17

6. As a precedent we cite Missouri ex rel. Gaines v. Canada, 305 U. S. 337-354, 83 L. ed. 208-215 17-18

V. Questions presented 19

1. The Supreme Court of Wisconsin unlawfully and arbitrarily discriminated against petitioner by affirming the decision of the trial judge in changing the answers of the jury to the first two questions of the special verdict, in conflict with the long line of its own decisions in a case where the proof is practically all one way and the precedents as we shall show deny the power of the court under the circumstances of this case so to tamper with the verdict of the jury 19

2. In like manner the Supreme Court of Wisconsin violated petitioner's constitutional rights by nullifying the answers of the jury to Questions 3 to 12, inclusive, of the special verdict on the ground of "conditional privilege," though the law is settled without dissent that no such pretext or defense exists as conditional privilege under the circumstances of this case 19

VI. Reasons Relied on for Allowance of Writ..... 20

1. The verdict of the jury was unanimously in favor of petitioner on every question submitted to it in the special verdict, 12 in all. There was abundant credible evidence in support of these findings. In these circumstances the changing of the answers of the jury from "yes" to "no" to the first two questions of the special verdict was utterly without sanction in the law and is uniformly prohibited 20

2. Apart from these first two questions of the special verdict and the change in the answers thereto the remaining portion of the special verdict has not been altered, vacated or set aside in any respect whatsoever. The facts thus found are therefore verities in this case. They justify judgment in favor of petitioner. It was nothing short of disregard of all law and denial of the rights of petitioner under the first section of the Fourteenth Amendment to the Constitution of the United States to deny motion for rehearing and reversal of judgment on this ground 20-21

3. Other irregularities, all of them discriminatory against the constitutional rights of your petitioner appear by the record herein 21

4.-5. The facts in this regard appear in Divisions I and II, pages 2 to 13..... 21

VII. Prayer for the issuance of a writ of certiorari to the Supreme Court of Wisconsin.....21-22

INDEX TO BRIEF.

PAGE

I. Introduction:

The violations of the Supreme Court of Wisconsin of petitioner's constitutional rights under the first section of the Fourteenth Amendment to the Constitution of the United States are clear and undeniable 23

The jury brought in a unanimous verdict favorable to petitioner on every question submitted, twelve in all. This verdict is divisible into two parts:

a. The first two findings wherein the jury found the libel charged petitioner with criminal misconduct;

b. The remaining 10 questions in which the jury found the libel charged him with misconduct which tended to bring him into public disfavor, hatred and contempt and so constitute libel *per se,*

1. The Supreme Court of Wisconsin wholly disregarded the law when it sanctioned the changing of the answers of the jury to the first two questions of the special verdict...23-24

2. The rule firmly entrenched in the jurisprudence of Wisconsin without departure is squarely prohibitive of what was done.....24-25

3. The cases to this effect are recent, clear, emphatic and incontrovertible. They apply to the Supreme Court of the state as well as in the trial courts 24-25

4. In either tribunal when the question comes up after verdict of the jury as in this case is the very narrow one: was there any credible evidence to support the jury finding? If so, it must stand in all courts..... 25

5. This basic rule buttressed as it is by a multitude of recent decisions of the Supreme Court of Wisconsin was ignored, in this case on appeal to the highest court of review in Wisconsin, though timely called to its attention 25

6. Besides, it was not claimed and cannot be truthfully claimed there was not abundant credible evidence in support of the jury's findings in respect of the answers of the first two questions 25

7. On the contrary, there was no evidence that can fairly or reasonably be construed in any other way 25

8. Respondents attempted to plead justification, but failed to do so either by apt pleading or by evidence at the trial, and finally abandoned their plea of justification entirely, thus stripping itself of every defense it had, except the interpretation put upon the language which it conceded it had published in many issues of their paper..... 25

9. The Supreme Court of Wisconsin on this appeal went far afield by closing its eyes to the plain language of the charge against petitioner of being to blame for the bombings and instead delved into extraneous, irrelevant and immaterial incidents that had really nothing to do with the issue on trial. 25-26

10. The Supreme Court of Wisconsin asserted false issues not in the case. It affirmed, contrary to law, its right as a court of review to determine whether the alleged libelous language was susceptible of the language used as interpreted by the jury in its verdict 26

11. The verdict of the jury in favor of petitioner under the instructions of the trial judge became verities subject only to the test of whether or not there was credible evidence in its support. The fact is there was no evidence of any other sort..... 27

12. Another instance of departure from the law was that the first two questions were suggested for the special verdict by respondents themselves and not until the jury had found against their contentions did they make motions after verdict assailing them. This was contrary to law and to fairness and destructive of petitioner's right to a fair trial 27

13. Cases cited from other states on this subject 27-28

14. The Wisconsin statute on the subject.....28-29

15. Moreover in these motions after verdict respondents estopped themselves from complaining of the answers of the jury to the first two questions for the reason their motions to the first question was not to strike it out, but to change the answers which has exactly the opposite result.....29-30

22. Cook Land Construction & Producing Co. v. Oconto Company, 134 Wis. 426, 430, cited and quoted 30

23. The charge of the trial judge on this subject 30-31

24. In all these ways the settled laws of the State of Wisconsin were ignored, disregarded or their effect evaded by the substitution of extraneous matter to the end that petitioner's right to equal protection of the law was openly disregarded 30-31

II. The second group of questions and answers of the jury in the special verdict were treated even more reprehensively 32

1. At the trial in motions after verdict respondents moved to have these questions stricken from the verdict or their answers changed. The trial judge denied these motions. The Supreme Court ignored this part of the verdict and disposed of the subject by saying that no judgment could be founded on them as what was said in the alleged libelous language was in the exercise of "conditional privilege"..... 32

2. On this subject the law of Wisconsin has long been settled so as to put it beyond all question of doubt or misgiving.....32-33

3. There are two reasons why there was no excuse for invoking the doctrine of "conditional privilege" in this case.....33-34

a. There can be no conditional privilege where the conduct of the person libeled is free from blame or participation in the transaction 33-34

b. Where, as here, the jury has found express malice on the part of each of the respondents their right to the defense of conditional privilege is destroyed 34

4. The law on each of these points is too clear for argument 34

5. Cases cited and extracts from opinions quoted .....

6. The only Wisconsin decision cited by the Supreme Court of Wisconsin to give semblance of authority to its decision in this matter is the case of Grell v. Hoard, 206 Wis. 187 34

7. Rightly understood this is an authority on the side of petitioner and not of respondents 35-36

8. The Grell case analyzed and applied to the circumstances of the instant case.....34-36

III. The Supreme Court of Wisconsin in its opinion quotes at length portions of respondents' answer ostensibly containing matters of justification.... 37

1. The answer of petitioner to these contentions is brief:

a. There was no valid pleading of justification in respondents' answer. The attempted justification was not as broad as the libel and it is elementary law that to be valid it must completely cover the charge 37

b. Even this tenuous attempt at justification respondents themselves abandoned in open court and refused to connect up what little evidence of a preliminary nature it had presented with petitioner .....

2. Besides, the attempt though carried but a short way, was unauthorized in the law of Wisconsin 37-38

3. Pellardis v. Journal Printing Co., 99 Wis. 156, Leuch v. Berger, 161 Wis. 564, 571 and Pfister v. Milwaukee Free Press Co., 139 Wis. 627, 651, cited and quoted.....37-38

4. Respondents themselves knew who were to blame for the bombings as appears by an article they printed the last day of the explosions, entitled "Out of a Terrible Week"; portion of this article quoted..... 38

IV. All these departures from settled law and practice had the effect of stripping your petitioner of all legal protection afforded every other person whose reputation has been unjustly assailed in the State of Wisconsin and violated openly and boldly his right to protection under the first section of the Fourteenth Amendment to the Constitution of the United States which guarantees to him equal protection of the laws..... 39

1. The importance of the issue here presented 39

INDEX TO CASES.

Act of Feb. 13, 1925, Chap. 229, 43 Stats. 936, printed as an appendix to the rules of this court, Vol. 307 U. S. Court Reports; 83 L. ed. 1661, 1663, Sec. 237 (b) 16-17

Bloomfield v. Pinn, 84 Neb. 472, 121 N. W. 716, 718.... 28

Borg v. Downing, 221 Wis. 463..... 24

Burton v. Brown, 219 Wis. 520, 523-524..... 24

Constitution of United States, Section 1, Fourteenth Amendment 13, 17, 31, 39

Cook Land Construction & Producing Co. v. Oconto Company, 134 Wis. 426, 430..... 30

Deustenberg v. State ex rel., 116 Ind. 144, 17 N. E. 624 27

Gale v. The State Ins. Co., 33 Mo. App. 664, 677..... 28

Gerlach v. Gruett, 175 Wis. 354, 359..... 34

Grell v. Hoard, 206 Wis. 187..... 34

Gumm v. Koepke, 227 Wis. 635, 637..... 24

Harter v. Dickman, 209 Wis. 283, 287..... 24

Jensen v. Jensen, 228 Wis. 77, 80..... 24

Leuch v. Berger, 161 Wis. 564, 573..... 33, 37

McKelvey v. Chesapeake & Ohio Railroad Co., 35 W. Va. 500, 14 S. E. 261, 263..... 28

Millard v. North River Ins. Co., 201 Wis. 69, 71..... 24

Pellardis v. Journal Printing Co., 99 Wis. 156..... 37

Pfister v. Milwaukee Free Press Co., 139 Wis. 627, 651 38

Riesehl v. Wisconsin-Michigan Power Co., 236 Wis. 116, 294 N. W. 521, 523..... 24

Sichling v. Nash Motors Co., 207 Wis. 16, 21..... 24

State of Missouri ex rel. Lloyd Gaines v. S. W. Canada, 305 U. S. 337, 83 L. ed. 208-216 ..... 17, 39

Steubing v. L. G. Arnold Inc., 210 Wis. 513, 515 24

Svenson v. Vondrak, 200 Wis. 312, 317 24

Trautmann v. Chas. Schefft & Son Co., 201 Wis. 113, 115, 116 24

Walter v. Four Wheel Drive Auto Co., 213 Wis. 559, 562, 563 24

Walters v. Sentinel Co., 148 Wis. 196 34

Wisconsin Statutes:

Section 251.09 29

Section 270.39 29

Section 340.73 8

Section 340.74 ..... 8, 29

Section 343.422 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. .....

DANIEL W. HOAN,

Petitioner,

vs.

THE JOURNAL COMPANY, HARRY J. GRANT AND LAWRENCE C. EKLUND,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN, U. S. A.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN AND BRIEF IN SUPPORT THEREOF.

To the Honorable, Harlan F. Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The matter involved in this case consists of arbitrary invasion of the constitutional rights of petitioner by the Supreme Court of the State of Wisconsin in a case that came before it on appeal from a judgment of the Circuit Court of Milwaukee County wherein said Supreme Court of Wisconsin in decision of said appeal departed wholly from a long line of its own decisions which had established, and still constitutes, the law of and for the State of Wisconsin and its citizens governing similar cases in jury trials. Such invasion also involved and still involves petitioner's constitutional rights as a natural born citizen of the United States and subject to its jurisdiction guaranteed to him by the first section of the Fourteenth Amendment to the Constitution of the United States of equal protection of the law whereby said Supreme Court of the State of Wisconsin affirmed said judgment of said trial court in total disregard of both said established law in said state and of the protection to petitioner of said clause of said amendment and thereby discriminated against him in this case in ways repugnant and contrary both to the settled laws of said state and to the fundamental law of the nation.

The action out of which such decision of said Supreme Court of Wisconsin arose was brought by said petitioner against respondents for libel (C. 8-20, Bottom pp. 9-21). A trial was had before the court and a jury and as demanded by respondents, a special verdict was submitted to and returned by the jury in which every question, twelve in all, was found and answered favorably to this petitioner (C. 43-45, Bottom pp. 44-46). Thereupon respondents herein moved the trial court to change the answers to the first

two questions of said special verdict, each of which they themselves had presented to the court for its adoption as part of such special verdict (C. 45, Bottom pp. 46-51); and the trial judge in decision of said motions unlawfully altered said portion of the verdict so returned by unauthorized and under the laws of Wisconsin wholly repugnant and prohibited changes in the answers of the jury from "yes" to "no", although abundant credible evidence in the case constituting in fact all the relevant evidence before the court was in support of said answers of the jury (C. 36-39, Bottom pp. 37-40); and in addition wholly ignored all of the other answers of the jury to the remaining questions numbered 3 to 12, both inclusive, which, alone and apart from said first two questions and their answers as returned by the jury, constitute in law a valid basis for judgment in favor of petitioner as will hereinafter be shown herein (C. 54-65, Bottom pp. 55-66). Said Supreme Court of Wisconsin on appeal duly taken arbitrarily and without semblance of right, precedent or authority affirmed and approved both these egregious departures from law together with other like prejudicial and unsupported holdings.

The gist of this action for libel, omitting non-essentials, was the publication in many issues of The Milwaukee Journal, a daily newspaper of Milwaukee printed by respondents, as follows:

> "• • • 'Mayor Hoan travels around the country telling how well Milwaukee is governed,' said the Mayor of Sheboygan Falls. 'Meanwhile terrorists bomb Milwaukee's police stations and banks. Mayor Hoan himself is to blame for those bombings'." (C. 15, Bottom p. 16.)

Obviously the last sentence constitutes the essentials of actionable libel herein.

The Mayor of Sheboygan Falls stoutly denied the authorship of said libel and so was not made a party to the

suit. Respondents here, defendants there, admitted they printed it.

The bombings in question were those that for a period of about ten days which included the repeated publication of said libel shocked, alarmed and stunned the people of Milwaukee by felonious explosions of dynamite which ruthlessly destroyed property amounting to many thousands of dollars, menaced and personally injured citizens until a large portion of the population was panic-stricken, aroused the police, sheriff's force, Federal officials and peace officers generally of the community to a degree never probably equaled in the history of the City, filled the public press with extended and detailed reports of crime and disorder unprecedented in this peaceful metropolis, and finally resulted in the death of three persons, including the two reckless perpetrators of all this criminal violence. When these alarming events were happening and public fear and indignation had reached a climax and the entire population was on the *qui vive,* blame for these "bombings" was bluntly and brutally attributed to your petitioner, though in truth and in fact he was absolutely innocent of the slightest complicity in them as the defendants well knew at least before the second publication of the libel was printed (C. 36-39, Bottom pp. 37-40).

Then it was definitely known and was admitted by respondents themselves that said bombings were the work of two wayward youths, "Idzi" Rutkowski and Paul Chovonec (C. 36-39, Bottom pp. 37-40). This is admitted by stipulation between the parties entered into in the presence of their counsel in open court as follows (title and venue omitted):

> "IT IS HEREBY STIPULATED AND AGREED by and between the parties to the above entitled action, all being present with their respective attorneys in open court, that the following statement of facts is true concerning the bombings referred to in the libel alleged and set forth in the complaint herein:

1. That the dynamite, fuses, detonation caps, and other equipment for the detonation and explosion of the dynamite was procured by Idzi John Rutkowski and Paul Chovonec from the magazines of the United States Government at Estabrook Park located in the limits of the City of Milwaukee, Wisconsin.

2. That said dynamite and equipment for its detonation and explosion were removed from said magazines in the nighttime on or about October 2, 1935, transported across the Milwaukee River, and taken to the garage owned by the father of said Idzi Rutkowski located in the rear of the premises known as 2121 W. Mitchell Street, Milwaukee, Wisconsin.

3. That some of said dynamite was used by said Idzi Rutkowski either alone or accompanied by said Paul Chovonec and exploded at the Village Hall of Shorewood in Milwaukee County in the late afternoon or early evening of October 26, 1935, resulting in extensive property damage to said building.

4. That on the following evening, namely, October 27, 1935, other portions of said dynamite so cached at said garage were in like manner used in bombing the branch bank at the intersection of North and Farwell Avenues, and also the branch bank at 3602 W. Villard Avenue, both in the City of Milwaukee, each explosion damaging substantially each bank so bombed belonging to and occupied as branch banks by the First Wisconsin National Bank of Milwaukee.

5. That on October 31, 1935, said Idzi Rutkowski and his said companion removed other portions of said dynamite from the garage at 2121 W. Mitchell Street and therewith bombed two police stations at 3rd and 5th precincts respectively, located at North 3rd and West Hadley Streets, and North 12th and West Vine Streets in the City of Milwaukee, in each case doing substantial property damage to said stations, injuring the occupants and bystanders thereof and menacing their lives.

6. That on November 3, 1935, shortly before 3 o'clock in the afternoon, said Idzi Rutkowski and Paul Chovonec went to said garage and were there killed by

an explosion of much of the remaining supply of dynamite, as was Patricia Mylnarek, nine year old daughter living with her parents Frederick and Clara Mylnarek, and physically injuring seriously many other persons in the neighborhood.

7. That at said time approximately 100 pounds of dynamite of 40% strength was exploded.

8. That said Idzi Rutkowski owned an automobile, the mechanics of which he understood well and was enabled to escape from each of the locations when bombings occurred, except the last when he was killed.

9. That said Idzi Rutkowski was born May 31, 1915, and was arrested by the police of the City of Milwaukee nine times in all from some of which arrests he was released, from others was acquitted and from still others involving larceny he was convicted, placed on probation or fined; that said Paul Chovonec was born May 2, 1919, was arrested by the police eight times between May 26, 1930 to September 9, 1934, most of said offenses being petty larceny, for some of which charges he was dismissed, from others released, from still others placed on probation and on one occasion was sentenced to the St. Charles Home for Boys for one year.

10. That said dynamite and equipment for its explosion was unlawfully and feloniously procured by said Rutkowski and Chovonec, and was unlawfully in their possession in said garage with intent to injure or destroy public or private property, and was exploded as above stated, wilfully and maliciously.

11. That simultaneously with the bombings above mentioned said Idzi Rutkowski wrote letters to the police and conspicuously posted cards in which demand was made, first for $100,000 to secure cessation of the bombings, later raised the demand to $125,000.00 stipulating in each case that payment should be in money, the denominations of the bills varying from $1.00 to $100.00 each.

Dated June 27th, 1940'' (C. 36-39, Bottom pp. 37-40).

Had the publication said, as it did not say, that Rutkowski and Chovonec were to blame for those bombings, it would have told the truth and no one would have any difficulty in understanding the statement (C. 36-39, Bottom pp. 37-40). Instead, respondents, knowing these boys were guilty and petitioner was wholly innocent, shamelessly transferred from them to him the complex of crimes involved in said libels.

This complex of crimes clearly set forth in the evidence included:

(a) Burglary in the nighttime of the United States government storehouse at Lincoln Park in the northern boundary of Milwaukee by breaking the door thereof and entering with intent to commit a felony. This burglary gave access to the dynamite of Rutkowski and Chovonec (C. 38, Bottom pp. 39-40).

(b) Larceny from this storehouse of 150 pounds of such dynamite and a liberal supply of fuses, wires, detonation caps and all other equipment appropriate to the setting off of the stolen dynamite (C. 36-39, Bottom pp. 37-40).

(c) The crime of malicious destruction of property as defined in Section 343.422 Wisconsin Statutes by transporting and exploding said dynamite so as to destroy public and private property and to injure the person and menace the lives of the people of Milwaukee contrary to said statute:

> "343.422 Malicious destruction of property. Any person who shall wilfully or maliciously injure or destroy any building, structure or other property of another, by the use of gunpowder, dynamite or other explosive substance or compound shall be punished by imprisonment in the State prison not more than fifteen years nor less than one year."

(d) The felony of transportation of dynamite for an unlawful purpose as defined in Section 340.73 Wisconsin Statutes, as follows:

> "340.73 Sale, transportation, etc., of explosive for unlawful purpose. Any person who shall make, manufacture, compound, buy, sell, give away, offer for sale or to give away, transport or have in possession any nitroglycerine, giant, oriental or thunderbolt powder, dynamite, balistile, fulgarite, detonite or any other explosive compound with intent that the same shall be used in this state or anywhere else for the injury or destruction of public or private property or the assassination, murder, injury or destruction of any person or persons, either within this state or elsewhere, or knowing that such explosive compounds are intended to be used by any other person or persons for any such purpose, shall be punished by imprisonment in the state prison not more than ten years nor less than three years or by fine not exceeding one thousand dollars nor less than five hundred dollars."

(e) The offense defined in Section 340.74 Wisconsin Statutes of aiding as accessories before the fact the transportation of explosive compounds including said dynamite knowing it was intended to be used for unlawful purposes as mentioned in the last preceding section, is contrary to the following law:

> "340.74 Aiding in so doing. All persons aiding, abetting or in any manner assisting in the manufacture, compounding, buying, selling, offering for sale or transporting any explosive compounds either by furnishing material or ingredients or soliciting or contributing money or other property with which to purchase said material or ingredients, or by assisting by skill or labor, or by acting as agents for the principal, or in any manner aiding as accessories before the fact, knowing that any of such explosive compounds are intended to be used by the principals or any other person or persons for any of the purposes mentioned in section 340.73, shall be deemed principals, and may be convicted and punished in the same manner and to the same extent as such principal or principals."

(f) Attempts at blackmail of banks, city officials and others, including the police and the public generally by demanding publicly in writing the sum of $100,000.00, later raised to $125,000.00, as a condition of cessation of said bombings (C. 39, Bottom p. 40).

Here are six separate crimes indubitably committed as shown by the record herein, by Rutkowski and Chovonec, known by respondents to be the culprits. Respondents nevertheless maliciously transferred the guilt of these two misdirected youths to plaintiff in the libel published in the Milwaukee Journal without the slightest scintilla of evidence or honest excuse for so blackening his reputation.

The special verdict is as follows:

> "Question 1: Would a person of average intelligence and comprehension, upon reading the entire article in question printed in the Milwaukee Journal of November 3rd and 4th, 1935, naturally have understood that it was thereby stated and charged that the plaintiff was guilty as a principal of the crime of malicious destruction of property?
>
> Answer: Yes.
>
> Question 2: If you answer Question 1 'no,' then answer this question: Would a person of average intelligence and comprehension, upon reading the entire article in question printed in The Milwaukee Journals of November 3rd and 4th, 1935, naturally have understood that it was thereby stated and charged that the plaintiff was guilty as accessory before the fact of the crime of malicious destruction of property?
>
> Answer: Yes.
>
> Question 3: If you answer Questions 1 and 2 'no,' then answer this question: Would a person of average intelligence and comprehension, upon reading the entire article in question published in the Milwaukee Journals of November 3rd and 4th, 1935, naturally have understood the statement concerning the plaintiff to charge him with neglect in the performance of his duty as mayor of the City to preserve the public peace

and good order of the City, as to charge him with moral responsibility for the bombings?

Answer: Yes.

Question 4: If you answer Question 3 'yes,' then answer this question: Did such statement tend or calculate to bring the plaintiff into shame, humiliation or disgrace?

Answer: Yes.

Question 5: If you answer Question 3 'yes,' then answer this question: Was such statement in the light of the article as a whole a fair comment on the acts and conduct of the plaintiff in the performance of his duties as mayor of the city of Milwaukee?

Answer: No.

Question 6: In writing the article in question published in the Milwaukee Journals of November 3rd and 4th, 1935, was the defendant, Lawrence C. Eklund, actuated by malice?

Answer: Yes.

Question 8: In publishing the article in question on November 4, 1935, was the defendant, The Journal Company, actuated by malice?

Answer: Yes.

Question 9: In publishing the article in question on November 3, 1935, was the defendant, Harry J. Grant, actuated by malice?

Answer: Yes.

Question 10: In publishing the article in question on November 4, 1935, was the defendant, Harry J. Grant, actuated by malice?

Answer: Yes.

Question 11: If the Court should be of the opinion that plaintiff is entitled to recover, at what sum do you assess his compensatory damages?

Answer: $10,000.00.

Question 12: If you answer any of Questions 7, 8, 9, 10 or 11 'yes,' and decide to assess punitory damages, then answer this question: What sum do you assess as and for punitory damages?

Answer: $10,000.00.

Dated June 28, 1940" (C. 43-45, Bottom pp. 44-46).

II.

EQUALLY ARBITRARY, UNAUTHORIZED AND UNLAWFUL ACTION WAS TAKEN BY THE SUPREME COURT OF THE STATE OF WISCONSIN IN APPROVING TOTAL DISREGARD OF QUESTIONS 3 TO 12 INCLUSIVE OF THE SPECIAL VERDICT AND THE ANSWERS OF THE JURY THERETO.

These answers and questions stand in the record undisturbed and unimpaired as verities in the case. Each one is undubitably sustained not only by credible evidence but also by all the relevant proofs in the case; and under the rule mentioned in Division I of this petition cannot now be disturbed or disregarded. Though requested on the ground of patent error and of violation of petitioner's right under the first section of the Fourteenth Amendment of the Constitution of the United States, the Supreme Court of the State of Wisconsin denied petitioner's requests on wholly untenable grounds as shall appear by our brief and devoid of any validity whatever. This action of said Supreme Court was and is unauthorized by the long established law of the State of Wisconsin as enunciated by it and applied by it in favor of other litigants under the same conditions as existed herein and still intact except by this solitary, silent departure. It is also an invasion and deprivation of the rights of petitioner to the equal protection of the laws guaranteed to him as a natural born citizen of the United States and subject to its jurisdiction under the first section of the Fourteenth Amendment to the Constitution of the United States. These questions and answers were not stricken, set aside, vacated or their answers disturbed in the slightest degree by said Supreme Court of the State of Wisconsin or by anyone else. They constitute

therefore *verities in the case*, abundantly sufficient to sustain judgment for petitioner and against respondents.

The language of the libel here is express. There is therefore no room for construction or interpretation. Its meaning and implications are unmistakable. The crimes charged were fresh in the memory of the public. The campaign of terrorism was still on when the first publication of defendants appeared, that of November 3, 1935, and the identity of the culprits was well known to them before the second publication, that of November 4, 1935. Nevertheless respondents knowingly, dogmatically and maliciously attributed the criminal rascality of Rutkowski and Chovonec to plaintiff, thus branding him utterly without rhyme or reason for their misconduct. These events were simultaneous practically with the publication of the libel. The circumstances and significance of the lawless defiance of authority and morality were signal and outstanding. They are indeed part and parcel of the libel itself.

The Supreme Court of Wisconsin arbitrarily affirmed the unauthorized, unlawful action by the trial judge whereby the answers of the jury abundantly supported by credible evidence as they were to the first and second questions of the special verdict were changed from "yes" to "no" and thereupon judgment was directed for respondents herein.

The remainder of the verdict, questions and answers numbered 3 to 12, both inclusive, alone constitute a valid cause of action in favor of petitioner and against respondents. They remain intact without change of any sort. They are verities in this case. They were ignored or arbitrarily disregarded in plain violation of uniformly well settled law in Wisconsin. Each of these glaring, illegal and unauthorized actions of the Supreme Court of Wisconsin constitutes a separate invasion of the rights of petitioner not only under the well settled law of Wisconsin; they also

constitute a violation of his right of equal protection of the law under the first section of the Fourteenth Amendment to the Constitution of the United States. We shall briefly further consider them with authorities in our supporting brief attached hereto.

Thus the action of the Supreme Court of the State of Wisconsin in affirming the decision on the appeal presented to it sanctioned the change of the answers of the jury to the first two questions of the special verdict from "yes" to "no" an absolutely arbitrary, unauthorized and unlicensed act on its part which amounted to complete denial to the petitioner as a natural born citizen of Wisconsin and of the United States and subject to its jurisdiction (C. 71, Bottom p. 72), but also of a plain violation of equal protection of the law guaranteed to him by the first section of the Fourteenth Amendment to the Constitution of the United States.

This request for recognition of petitioner's right to equal protection of the laws of this state and of the nation as secured to petitioner by the Fourteenth Amendment to the Constitution of the United States was presented to said Supreme Court of Wisconsin with the request that in the event its decision should be adverse to petitioner's claim of right under said section of the national constitution, review of such decision by this court and the whole case and all of the fundamental constitutional rights of your petitioner in this action might be presented to this court.

Thereupon on July 7, 1941, said Supreme Court of Wisconsin by its decision filed the following decision:

> "*Per Curiam.* On motion for rehearing. In support of his motion for rehearing, plaintiff contends that in trial of the action he was denied due process of law and the equal protection of law under the Fourteenth Amendment to the constitution of the United States. We have carefully examined this contention and find no basis for its support in the record.
>
> Motion for rehearing denied with $25 cost." (pp. 525-526.)

III.

Petitioner respectfully says that the Supreme Court of Wisconsin is the highest court of law or equity in said State of Wisconsin; that the judgment of said court here complained of is a final judgment and presents a question in this case, namely, the power of said Supreme Court of Wisconsin to disregard a long line of its own decisions in which it uniformly held that neither the trial court, nor the Supreme Court has the right to change the answers to questions of a jury as they were changed in this case, nor arbitrarily to deny significance and validity to the portion of the verdict of the jury remaining herein, namely questions 3 to 12, inclusive, and the respective answers to each of them, which, without aid from questions 1 or 2, or either of them, in and of themselves constitute an independent valid basis and cause of action abundantly sufficient to warrant judgment for the plaintiff in the amount of damages found by the jury and that said portion of the verdict has not been disturbed, altered or stricken nor has any answer to any question therein been vacated, stricken or modified in this portion of the verdict in the slightest degree whatsoever. Instead, said Supreme Court of Wisconsin has misunderstood or evaded a decision of this assignment of error on appeal by resort to what this litigant can only regard as the pretext of "conditional privilege" in the situation presented herein which under said Court's own decisions has no standing or validity whatsoever in the face of undisputed facts pertinent to these issues such as petitioner's absolute freedom from fault for any connection with the bombings and the finding in the verdict of malice against petitioner on the part of all respondents and the settled law thereon which we shall present in our brief with comments which utterly destroy the conclusions of said Supreme Court of Wisconsin on these issues.

By either or both of said wide and inclusive departures from settled law and practice, to-wit, (a) arbitrary sanctioning the change of the answers to the first two questions of the special verdict which found the libel herein charged respondents with crime from "yes" to "no"; and (b) the pretext of disposing of the balance of the answers to the remaining ten questions of the special verdict which, taken independently and wholly apart from the first two questions, constitute a perfectly valid basis for a judgment in favor of petitioner herein and against said respondents, on the equally serious charge they tended to bring petitioner into public hatred, ridicule, or contempt, said Supreme Court of Wisconsin made no decision of either issue, but instead, arbitrarily discriminated against your petitioner regardless of evidence, regardless of law and regardless of the rights of your petitioner as a natural born citizen of the United States and subject to its jurisdiction to the equal protection of the laws found in the first section of the Fourteenth Amendment to the Constitution of the United States and by so doing in this one case, contrary to all other of its own adjudications the Wisconsin Supreme Court has arbitrarily denied petitioner fundamental and constitutional rights which, this court can now redress by review of said decision of said Supreme Court of Wisconsin. Otherwise your petitioner will be left utterly without protection, redress or remedy for one of the gravest wrongs that may be inflicted on an American citizen.

IV.

THIS COURT'S JURISDICTION TO ALLOW THIS PETITION IS CLEAR.

The protection afforded to natural born citizens of the United States and subject to its jurisdiction by the first clause of the Fourteenth Amendment to the Constitution of

the United States of equal protection of its laws is not self-enforcing. It is assumed the several states will not lightly refuse to grant such protection or to fail to respond to a request for its aid therein. But on failure of any state so to do the natural born citizen subject to the jurisdiction of the Constitution of the nation cannot be left without remedy for any deprivation of his fundamental rights. Here is such a case. Petitioner is put in the position of submitting to most humiliating violations of his rights under the national constitution or to apply to this court for his remedy.

We respectfully submit that the very existence of the guaranty found in the first clause of the Fourteenth Amendment here in question implies necessarily that some branch of the national government in every meritorious case will exercise the power necessary to make its effectual. Very plainly in the instant case, if this petition for a writ of certiorari from this court to the Supreme Court of Wisconsin be denied the clause referred to of the citizen's right to equal protection of the laws upon proper application may as well be eliminated from the federal constitution; for no more flagrant instance for its vindication can well be imagined.

We further respectfully submit that in perfect harmony with the general conclusion drawn from the language of the constitution itself petitioner's right herein has been reinforced by congressional action.

> Act of Feb. 13, 1925, Chapter 229, 43 Stats. 936, printed as an appendix to the rules of this court, Vol. 307 of United States Court Reports; 83 Law Edition, 1661, 1663, Section 237 (b).
>
> Here it is provided:
>
> "(b) It shall be competent for the Supreme Court, by certiorari to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ

of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had where is drawn in question the validity of a treaty or statute of any state on the ground of its being repugnant to the constitution, treaties or laws of the United States; *or where any title, right, privilege, or immunity is specially set up or claimed by either party under the constitution,* or any treaty or statute of, or commission held or authority exercised under the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to grant a review on certiorari under this paragraph."

We respectfully submit that the right of petitioner herein, a natural born citizen of the United States and subject to its jurisdiction to the equal protection of the law under Section 1 of Amendment 14 to the Constitution of the United States is a "title, right, privilege or immunity specially set up and claimed by either party under the constitution."

This claim of right of protection against invasion of your petitioner's right as a natural born citizen of the United States and subject to its jurisdiction was raised as soon as it could be anticipated or known to him that the Supreme Court of Wisconsin would do the things the record herein discloses, viz.: to disregard its own most recent decisions, and to ignore petitioner's rights to the extent shown in the decision and opinion of the Supreme Court of Wisconsin set forth in full herein.

In support of these views we cite:

Missouri ex rel. Gaines v. *Canada*, 305 U. S. 337-354, 83 L. ed. 208-215.

In that case, instead of a decision of the highest court of a state within the American Union, the validity of a statute —a legislative act—of the State of Missouri was before this court. Your Honorable tribunal took jurisdiction thereof on certiorari and vindicated the fundamental constitutional right of the colored applicant to public educational opportunities equally with white citizens, but theretofore denied to him. It would seem reasonable to consider that the acts of the three great departments of state government would stand on the same plane and be equally subject to revision by this court when constitutional rights of citizens of this nation are involved. Arbitrary oppressive judgments of the judiciary may injure innocent citizens as well as can unconstitutional legislative enactments. In either case the state itself has acted through one of its three great departments—legislative, executive or judicial. Though each department is separate and independent of the others, none of them can validly set up a claim of "state's rights" if there be involved thereby impairment of the constitutional right of a natural born citizen of the nation and subject to its jurisdiction. For this is a right protected by the fundamental law of the land.

In the Gaines-Canada case, *supra,* pretexts of every sort were indulged to save the offending statute of Missouri, but they were all wiped aside as pretexts merely, ineffective to outweigh the constitutional rights of the petitioner, violation of which might permit them to continue. And so here; as the decision of this court invalidated the statutes of Missouri which was in violation of the fundamental law of the nation, on similar ground this court may now invalidate and reverse the decision herein of the Supreme Court of the State of Wisconsin.

V.

QUESTIONS PRESENTED.

1. The Supreme Court of the State of Wisconsin, contrary to the first section of the Fourteenth Amendment to the Federal Constitution unlawfully and arbitrarily discriminated against petitioner by affirming the decision of the trial judge in changing the answers of the jury to the first two questions of the special verdict contrary to fact and in conflict with a long line of its own decisions without mentioning or overruling those decisions which prohibit rejection or substitution of the answers of the jury if there be any credible evidence in their support as here, where the proof is overwhelmingly in favor of such answers and it is settled law that neither the trial judge nor the Supreme Court of Wisconsin may in such circumstances ignore, change or substitute for the answers of the jury any other answer and thereupon approve judgment in favor of respondents.

2. That said Supreme Court of Wisconsin violated petioner's rights under said section of said Fourteenth Amendment to the Federal Constitution by failing to grant judgment in favor of petitioner and against respondents in said action upon the answers to questions 3 to 12, inclusive, of the special verdict of the jury wherein malice was found against the defendants upon credible evidence and by a long line of decisions of said Supreme Court of Wisconsin, without any dissent therefrom in any other cases, it is settled law that there is no conditional privilege on the part of respondents where express malice is found as in this case nor as is the fact in this case, may there be any judicial recognition of the doctrine of conditional privilege for the defendants where there is in the evidence no scintilla of proof of misconduct of your petitioner in respect of the matter embraced in the libel in this case.

Your petitioner presents to this court and files herewith

a duly certified transcript of the entire record in the case as it appears in the Supreme Court of Wisconsin and a duly certified copy of each, the opinion of that court in this cause and its per curiam decision on the Federal question herein.

VI.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

Your petitioner respectfully submits as grounds of his application and petition herein:

1. That the verdict of the jury by unanimous vote of its members found in his favor on every issue submitted to it in a special verdict of a dozen questions. The Supreme Court sanctioned and approved and gave final effect as the court of last resort of said State of Wisconsin to the setting aside of affirmative answers to the first two of those answers and substituting therefor negative answers to them in violation of a long line of decisions of its own settling the law of the State of Wisconsin on the subject beyond any doubt whatever that if the verdict of the jury on any subject about which there is room for difference of opinion decides a question or a series of questions in accordance and in harmony with the credible evidence in the case, no judge, not even the Supreme Court itself, may change any such answer of the jury.

That however recreant the judiciary of any state may become in the administration of justice no person within the scope of the first section of the Fourteenth Amendment to the Constitution of the United States may be denied equal protection of the law; and if he cannot secure such protection in the courts of his own state he may rightfully carry the case to the Supreme Court of the United States.

2. That apart from the first two questions and the answers thereto in the special verdict in this case there were ten other questions and the answers thereto which, independently and of themselves, establish a cause of ac-

tion in favor of petitioner and against respondents on the ground that the libel herein charges petitioner with misconduct that certainly tend to make him an object of public hatred, ridicule and contempt, which, under the law of Wisconsin constitutes libel *per se* and requires entry of a judgment in his favor and against respondents. The Supreme Court of Wisconsin has wholly evaded these facts.

3. That other irregularities all of them discriminating against the constitutional rights of your petitioner and in favor of respondents add to the seriousness of the situation and the insecurity of the citizen in the protection of his constitutional rights by the courts of his own state.

4. That in these days of international hatred and possible impending war, the public opinion of a state or of a large and respectable portion of its citizens may be led by arbitrary acts of injustice to doubt the reality of this government being one devoted to security of life, liberty and reputation of its citizens when wantonly attacked. The nation is now rightfully emphasizing the duty of citizens to support their government financially and with their health, their bodies and their lives. Is there no correlative duty on the part of the government to protect its citizens against wanton injustice?

5. The facts in this regard appear *ante* in Divisions I and II, pages 2 to 13.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Wisconsin, commanding that court to certify and send to this court for its review and determination, on a day certain therein to be named, a full and complete transcript and the record of all proceedings in the case numbered and entered on its docket, No. 89 January Term, 1941, entitled Daniel W. Hoan, plaintiff and appellant, *vs.* The Journal Company, Harry J. Grant and Lawrence C. Eklund, defendants and respondents, and that said order for

judgment made and entered in said case, May 20, 1941, and rehearing thereon denied under date of July 7, 1941, be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

FRANCIS E. MCGOVERN,
Counsel for Petitioner.

CITY OF WASHINGTON,
DISTRICT OF COLUMBIA. } ss.

DANIEL W. HOAN, being first duly sworn, on oath says that he is the petitioner named in and who signed the foregoing petition; that he has read said petition and knows the contents thereof and that the same is true to his own knowledge, except as to the matters therein alleged on information and belief, and as to those matters he believes it to be true.

DANIEL W. HOAN,
Petitioner.

Subscribed and sworn to before me this 1st day of October, 1941.

VIRGINIA COMFORT,
(NOTARIAL SEAL) *Notary Public.*

My commission expires June 15, 1946.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. _____

DANIEL W. HOAN,

Petitioner,

vs.

THE JOURNAL COMPANY, HARRY J. GRANT AND LAWRENCE C. EKLUND,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Supreme Court of the State of Wisconsin was without right or justification under principles of law and jurisprudence enunciated to the following effect: that it has heretofore established by a long line of decisions that in respect to questions in jury cases like, or identical in their circumstances with this case, the answers of the jury are final if supported by credible evidence and not subject to alteration by any trial judge or even the Supreme Court of the State of Wisconsin.

Among these decisions are the following:

"If the evidence is conflicting, or if the inferences to be drawn from the credible evidence are doubtful

and uncertain, and there is any credible evidence which under any reasonable view will support or admit of any contention of any party, then the rule that the proper inference to be drawn therefrom is a question for the jury should be firmly adhered to, and the Court should not assume to answer such question either upon a motion for non-suit or direction of verdict, *or by substituting* another answer after the verdict is returned."

Trautmann v. *Chas. Schefft & Son Co.*, 201 Wis. 113, 115, 116.

This rule has been confirmed in the following cases:

Jensen v. *Jensen*, 228 Wis. 77, 80.
Borg v. *Downing*, 221 Wis. 463.
Steubing v. *L. G. Arnold, Inc.*, 210 Wis. 513, 515.
Gumm v. *Koepke*, 227 Wis. 635, 637.
Sichling v. *Nash Motors Co.*, 207 Wis. 16, 21.
Harter v. *Dickman*, 209 Wis. 283, 287.
Svenson v. *Vondrak*, 200 Wis. 312, 317.
Walter v. *Four Wheel Drive Auto Co.*, 213 Wis. 559, 562, 563.
Riesehl v. *Wisconsin-Michigan Power Co.*, 236 Wis. 116, 294 N. W. 521, 523.
Millard v. *North River Ins. Co.*, 201 Wis. 69, 71.
Burton v. *Brown*, 219 Wis. 523-524.

In the Riesehl case above cited said Supreme Court of Wisconsin said, quoting *Borg* v. *Downing*, 221 Wis. 463, 465:

"If there is any credible evidence, which under any reasonable view will support or admit of an inference for or against the claim or contention of any party, then what is the proper inference to be drawn therefrom is for the jury, and the court should not assume to answer such questions by substituting another answer after the verdict is returned."

In the second last case cited the rule theretofore made

inviolable as to trial courts was extended to the Wisconsin Supreme Court itself, where it was said at the last mentioned page:

> "In the case at bar, if there was any credible evidence which under any reasonable view fairly admitted of any inference that supported or admitted of the jury's finding that the hazard was not increased, then it was necessary to submit that issue to the jury, and neither the trial court, *nor this court* (namely, the Supreme Court of Wisconsin), *could properly substitute an affirmative answer for the jury's answer to that question.*" (The parenthetical phrase is ours.)

In this case we maintain that not only was there credible evidence to support the answers of the jury to every question submitted to them in the special verdict of twelve questions, but that there was, when rightly viewed, no evidence whatsoever to support any other conclusion. Careful reading of the stipulation between the parties in open court leaves no room whatsoever for any other view (C. 36-39, bottom pp. 37-40).

All of the relevant and material evidence in the record, introduced by plaintiff, every bit of it highly credible, supports the jury's findings; *and there is absolutely no evidence to the contrary.* There is *an attempt in defendants' pleadings to substitute for the issue of responsibility for the "bombings" mentioned in the libel, questions of divergence of view respecting the ethics of labor strikes, lockouts and other irrelevant matter.*

The opinion of the Supreme Court of Wisconsin construes away all defamatory features and significance of a virulent libel of plaintiff by recourse to and substitution of *irrelevent and immaterial facts said to have happened in Sheboygan Falls 55 or more miles away at another time where no bombing ever occurred as far as the record shows, no burglary or larceny of government property was ever committed, no violation of the statutes of the state pro-*

hibiting the illegal and improper possession, use or participation in explosion of dynamite, took place, no building was wrecked, no human life was lost and no situation similar in any respect was presented to the real setting of the publications complained of in this case.

At the trial no one doubted the power or propriety of the trial judge to say whether or not the libelous language published by the defendants was susceptible of the meaning attributed to it by the plaintiff, but that it was for the jury to say whether such was the true meaning of the language used. It is now said in the opinion of the Supreme Court of Wisconsin on the appeal herein that the trial court on motions after verdict has the power of *determining whether language alleged to be libelous is susceptible of the meaning attributed to it in the complaint.* Such is not the law of Wisconsin. The trial judge here was not denied the right to determine whether or not the language of the alleged libel was susceptible of the meaning attributed to it by the plaintiff. *The fact is the trial judge exercised this power.* In this respect he functioned fully. In doing so he granted *respondents' request to submit the issues of fact to the jury on a special verdict. They themselves asked for inclusion in such special verdict the very questions, 1 and 2, now under consideration.* The trial judge accepted their suggestions and submitted them in the form shown in questions 1 and 2 of the special verdict.

Moreover, the trial judge charged the jury concerning their duty to find for or against either party as they found the facts to be concerning *the issues presented by those two questions.*

The trial court told the jury they might answer both of these questions "yes," and if they should not find the proofs satisfactory to them, they must answer these questions "no." The jury strictly, religiously followed the instructions of the court and brought in their answers in

perfect harmony with all the proofs at the trial. *So the judge functioned completely in his right to determine whether or not the libelous language complained of was susceptible of the interpretation placed upon it by the plaintiff.* Having done so and there being abundant credible evidence in support of such findings of the jury, indeed no relevant, material evidence to the contrary, neither the trial court nor the Supreme Court of Wisconsin may now *arbitrarily change* the answers of the jury to such questions without violation of a firmly established rule of law in this state that in such a situation both courts are limited to the very narrow inquiry of whether or not there is any credible evidence to sustain the jury's findings. Thus we say that in a very true sense the answers to Questions 1 and 2 of the special verdict became verities in this case and now no Judge, not even the Supreme Court of the State of Wisconsin, can lawfully alter, strike or ignore such answers of the jury. Such is the hitherto unbroken law of the State of Wisconsin.

Though there is no decision of the Supreme Court of the State of Wisconsin on the point, in sister states the law is firmly settled that *one may not request a ruling* or order, such as the submission of a proposed question to be embodied in a special verdict and *afterward assign the court's action in complying with such request as a ground for reversing or setting aside* the verdict. In Indiana the highest court said:

> "The party who secures the submission of interrogatories may not withdraw them after the return of the general verdict. When approved by the Court, and properly submitted to the jury, they become a matter of interest to both parties; and neither can deprive the other of a right to have answers returned by the jury."
>
> *Duestenberg* v. *State ex rel.*, 116 Ind. 144, 17 N. E. 624.

So also in Missouri. It was there said:

"Defendant's counsel further objects to the character of the verdict and finding of the jury. He insists that 'the evidence gave no values upon which the jury could base its special verdict and findings.' If so, why did the defendant request the court to submit special issues to the jury? Surely it cannot be permitted to present special issues to a jury and then object for the reason that there was no evidence upon which the jury could make any such findings.

"The appellant cannot be heard to allege that as error of the trial Court which it invited the Court to commit."

Gale v. *The State Ins. Co.*, 33 Mo. App. 664, 677.

A like rule prevails in the State of Nebraska:

"Where a party has requested the submission of special questions to the jury to be answered by them, and the answers returned are sustained by the evidence, he cannot be heard to complain of such answers."

Bloomfield v. *Pinn*, 84 Neb. 472, 121 N. W. 716, 718.

And so also in West Virginia. The highest state court has said:

"Even if the Court would have been justified in refusing them, (requested questions for a special verdict) it does not follow that after the Court had once exercised its discretion by submitting the question it could retrace its steps and withdraw them."

McKelvey v. *Chesapeake & Ohio Railroad Co.*, 35 W. Va. 500, 14 S. E. 261, 263.

The same is the rule not in the form of a judicial decision, but as statutory law in Wisconsin. It is as follows:

"In any trial before the court with or without a jury or before a referee * * * any party *who expressly requests any finding of fact, conclusion of law, instruction to the jury or ruling or order shall not be heard*

> *to question its correctness on appeal.* This shall not, however, limit the power of the Supreme Court to Section 251.09 statutes."
>
> Section 270.39 Wisconsin Statutes.

This statutory rule is not modified by Section 251.09 which applies only to cases where it shall appear to this court from the record,

> "that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried."
>
> Section 251.09 Wisconsin Statutes.

We respectfully submit these exceptions do not belong in either of the classes mentioned.

The foregoing propositions should rule the issue in this case as to the right of petitioner to have the answers of the jury to the first two questions retained as returned by the jury.

Respondents contended at the hearing of the motions after verdict that Questions 1 and 2 of the special verdict conflicted and that an affirmative answer to the first would necessarily eliminate the second. This suggestion is without merit. Petitioner at that hearing suggested the two questions be merged into one as they supplement each other; and when, as here, the jury answered them both in the same way, taken together they constitute strictly only one finding of ultimate fact in the case, namely, that the libel here charged was not only susceptible of being interpreted, but it actually was understood by persons of average intelligence and comprehension to accuse petitioner of the crimes of malicious destruction of life and property. In Wisconsin the same punishment is prescribed for guilty principals and guilty accessories before the fact. (See Section 340.74 Wisconsin Statutes.)

In addition, it is clear respondents have in another way

estopped themselves from now having the answer to Question No. 1 and to Question No. 2 by virtue of the fact that in their motions after verdict they made no motion to strike Question No. 1, but instead moved to change the answer thereto from "yes" to "no." It is the settled law of this state that the effect of this motion of respondents is to confirm the question as properly submitted to the jury and to ratify the jury's answer thereto. This point arose some years ago where respondents moved similarly to change the answer of the jury, but said court without dissent, said:

> "So far as respondent is concerned, the seventh question was properly submitted under proper instructions and properly stands in the record, *and full effect must be given to the answer.* After the verdict was rendered respondent's counsel did not move to strike out the seventh question and answer, but his motion was to change the answer, *which must have been made upon the assumption that the seventh question was properly submitted and under proper instructions.*"
>
> *Cook Land Construction & Producing Co.* v. *Oconto Company,* 134 Wis. 426, 430.

Such is the only decision of this court on the point here presented. We submit it precludes defendants from moving to change the answer as they did, after the verdict had been returned.

On the issue of exercise by the trial judge of his power to determine whether the libel complained of is susceptible of the interpretation placed upon it in the complaint, as well as his view there was no incompatibility between the first question and the second question of the special verdict, the trial judge's charge to the jury is illuminating. Here it is:

> "You will not answer Questions 1 and 2 'yes,' unless you are satisfied to a reasonable certainty that the article complained of would be understood by a

person of average intelligence and comprehension as accusing the plaintiff of actual guilt of the crime of malicious destruction of property or as accessory before the fact of the crime of malicious destruction of property. If you are not so satisfied, you will answer them 'no'." (C. 4, Bottom p. 5.)

Specifically in their motions and argument after verdict respondents criticized this instruction as a departure from the directions of the trial judge to the jury.

In respect of the matter just mentioned, namely, the action of said Supreme Court of Wisconsin in affirming the erroneous decision of the trial court in changing the answers of the jury to the first two questions of the special verdict from "yes" to "no," was not only grievous error, but also was and is a denial to the petitioner (who is a natural born citizen of the United States and subject to its jurisdiction) (C. 71, Bottom p. 72) of that equal protection of the law guaranteed to him by the first section of the Fourteenth Amendment to the Constitution of the United States.

This plea for equal protection of the law as secured to petitioner by the first section of the Fourteenth Amendment to the Constitution of the United States was squarely presented to the Supreme Court of the State of Wisconsin for consideration and determination. That tribunal did consider and determine it, but their decision was against the claim of reversal for a change in their prior decision including the ground that it had so considered said claim but "found no basis for its support in the record."

II.

EQUALLY OR EVEN MORE DESTRUCTIVE OF PETITIONER'S RIGHTS BY THE SUPREME COURT OF WISCONSIN IS THAT IT FOLLOWED THE LEAD OF THE TRIAL COURT IN REFUSING TO GRANT JUDGMENT AS MOVED BY PLAINTIFF IN HIS FAVOR ON THE ANSWERS OF THE JURY TO QUESTIONS 3 TO 12, INCLUSIVE, OF THE SPECIAL VERDICT. THESE ANSWERS OF THE JURY TO SUCH QUESTIONS WERE NOT DISTURBED BY EITHER THE TRIAL COURT, OR THE SUPREME COURT OF WISCONSIN.

This portion of the verdict thus stands in the record undisturbed and unimpaired *as verities in the case.* Each one is indubitably sustained by credible evidence and under the rule mentioned in Division I of this brief, cannot now be disturbed or disregarded. What has happened is that in the trial court on *motions after verdict* and in the Supreme Court of Wisconsin on appeal from the judgment herein adverse to petitioner the answers of the jury to Questions 3 to 12, both inclusive, are in each case not squarely met, but are sought to be circumvented by inappropriate, irrelevant invocation of the inapplicable doctrine of "conditional privilege."

We shall not here and now multiply words or cases or authorities on this subject. We simply contend the doctrine of conditional privilege has no application whatsoever to this case. This is so for two independent, separate, distinct reasons, *either of which alone* is sufficient to authorize judgment for petitioner on this portion of the jury's verdict:

(a) There is not in the record herein a scintilla of evidence of any wrongful, censurable or improper conduct

on the part of petitioner in respect of the bombings mentioned in the libelous charge. The Supreme Court of Wisconsin has repeatedly and without exception heretofore held that in these circumstances there is no foundation, license or excuse for invoking the doctrine of conditional privilege as it applies only to cases where the petitioner has committed some fault in connection with the libelous transaction and with a foundation of fact to go on, the courts have permitted the printing of the facts with such comment as may be proper or allowable. But this is not an unbridled license for falsehood as in the present case. Petitioner is absolutely and wholly free from fault in connection with the "bombings" in this action and this is why when the time came for establishing some connection between Rutkowski and Chovonec on the one hand, and on the other petitioner herein, respondents had no evidence because there was no such connection. In other words, *there must be a basis of fact in petitioner's conduct relative to the libel* to permit the doctrine of conditional privilege in the case of a member of the press when hailed into court for libel.

The rule is aptly stated in *Leuch* v. *Berger*, 161 Wis. 564, 573, in language so plain, no excuse can be made for not understanding and enforcing the doctrine:

> "This court has no disposition to restrain the legitimate freedom of the press. That freedom *does not comprehend the publication of untruthful statements about a private person or public officer*, where such statements charge *crime or tend to make the individual or officer attacked an object of public hatred, ridicule, or contempt.* In the hurry with which news is gathered and put into print, it is often difficult to verify its accuracy. But where it is of the character stated, *the publisher is bound at his peril to know whether it is true or false before it is given out to the world as true.*" (Italics ours.)

There must *be a basis of fact* to sustain any publication

put forth under claim of the right to print, conditional privilege or any other similar pretext. Here there is no such basis or any scintilla of evidence of such a claim.

Walters v. *Sentinel Co.*, 168 Wis. 196.

(b) The second, separate, distinct reason why there is and cannot be conditional privilege in this case is that the jury found all the respondents *guilty of express malice* toward petitioner *in the answers made to Questions 3 to 12*, both inclusive, *and these answers still stand.* This alone destroys any claim any of respondents may have to conditional privilege. This rule is tersely stated by the Supreme Court of Wisconsin as follows:

> "If express malice be found it destroys the conditional privilege that would otherwise obtain. *Rude* v. *Nass*, 79 Wis. 321, 328; *Joseph* v. *Baars*, 142 Wis. 390; *Arnold* v. *Ingram*, 151 Wis. 438, 458. *Williams* v. *Hicks Printing Co.*, 159 Wis. 90."
>
> *Gerlach* v. *Gruett*, 175 Wis. 354, 359.

The only decision relied on by respondents and twice cited by the trial court in its decision on the motions after verdict is *Grell* v. *Hoard*, 206 Wis. 187 (C. 52, Bottom p. 53). Petitioner respectfully submits the Grell decision is not in point in support of the judgment in the instant case:

(a) The Grell decision was made in an appeal from an *order* of the Circuit Court of Jefferson County *overruling a demurrer* to one of the causes of action of the complaint. *There was no trial*, and, unlike the case at bar, *no verdict of the jury sustaining the cause of action demurred to.* In this state of the record the Supreme Court of Wisconsin said:

> "If the demurrer were overruled, the case tried and a verdict of the jury returned in favor of plaintiff we would then have the question before us whether the article in question charges the plaintiff with recklessly causing the death of travelers.

> Interpreted *as the pleader interpreted the article,* it was not libelous. Charging a public officer with being inefficient and incapable of the performance of the duties of his office *when the charge has some fair and reasonable basis in fact is not libelous."* (Italics ours.)

In the instant case there is no fair or reasonable basis of fact, indeed, *there is no such basis at all.*

(b) Secondly, as interpreted by the pleader, the article in the Grell case was held not libelous for the reason that so interpreted it merely charged the plaintiff with being inefficient and incapable. The condemnation or lack of regard for human life and safety was held not to apply to the plaintiff but to the type of ditch "which as highway engineer he had constructed."

So the Supreme Court of Wisconsin did not consider the aspect of the charge interpreted as involving the safety of travelers. Thus there was an alternative construction of the libel that made some sense in view of the blunder of plaintiff's counsel. *Here there is no such alternative interpretation whatsoever.* Here no fact in the record implicates Hoan *in the slightest degree with any misconduct within the terms of the libel.* Lacking such a basis for a journalistic criticism *there can be no conditional privilege and no right to print anything that is not true without incurring the penalties provided by the law of libel.* So the Grell case is really an authority on the side of petitioner.

(c) Thirdly, the Supreme Court of Wisconsin frankly stated that its decision in *Grell* v. *Hoard* presented *"a close one and crowds the line between privileged and unprivileged publications."* It is not therefore a precedent to be indiscriminately followed.

(d) Finally, there is no sanction found in the Grell case that such a libel as is here presented is privileged. On the contrary, *it holds exactly the opposite.* It limits the field of conditional privilege in criticism of a citizen, even a public officer, *to cases where there exists a basis of fact to*

justify criticism which may be indulged in so long as it does not charge what is false. Without such a basis of fact of any misconduct of petitioner as charged in the libel, least of all that he participated in the most remote way in the "bombings" shown by the evidence, there is no foundation for the defense of conditional privilege. Privilege must have some basis of fact to go on. Suspicion, falsehood or faultfinding without any basis at all, as here, does not license the editorial pen. Falsehood, even falsehood so gross it may appear incredible to some, will not suffice. There must exist some basis of undoubted fact of the truth of the libel charged. Here there is nothing of the sort—just naked denunciation and blame for responsibility for monstrous crimes; for the language here amounts to just this plain charge. Blame for the bombings means participation in some way in the six crimes plainly defined by our statutes on the use of dynamite, including burglary and larceny plus the odious charge of blackmail.

Here again petitioner invokes the protection as a natural born citizen of the United States and subject to the jurisdiction thereof (C. 71, Bottom p. 72), of the first section of the Fourteenth Amendment to the Constitution of the United States of equal protection of the law in this case equal with all other citizens in like status and circumstances. In every instance the verdict of the jury in his favor, including the portion embraced in the answers to Questions 3 to 12, both inclusive, was and is invulnerable to just attack by respondents and have been so held in other cases of libel without exception of any kind for so many years where like questions arose that the rights based on them are and should be unassailable.

III.

THE SUPEREME COURT OF WISCONSIN IN ITS OPINION STRESSES AND SETS FORTH AT LENGTH PORTIONS OF RESPONDENTS' ANSWER OSTENSIBLY CONTAINING MATTERS OF JUSTIFICATION AS CLAIMED, BUT WHICH RESPONDENTS LATER IN THE TRIAL COURT ABANDONED.

The Supreme Court of Wisconsin apparently based, in part at least, its decision on petitioner's appeal herein on the portion of respondents' answer setting up or attempting to set up a plea of justification. Petitioner submits in the first place that the pleas were not good because none of them was as broad as the libel, which is a requirement in all cases where justification is pleaded; next, these defenses were not in the affirmative, but in the subjunctive mood as grammarians would say, and therefore not valid pleas.

Pellardis v. *Journal Printing Co.*, 99 Wis. 156.

Another rule of law firmly imbedded in the jurisprudence of Wisconsin is that a

> "Defendant may not attribute some recondite meaning to the published article and proceed to justify on this basis. *Pfister* v. *Milwaukee Free Press*, 139 Wis. 627. The words used must be construed in the plain and popular sense in which they would naturally be understood. *Bradley* v. *Cramer*, 59 Wis. 309, 312."
>
> *Leuch* v. *Berger*, 161 Wis. 564, 571.

The precise language used in the Pfister case first above cited is as follows:

> "The defendants could not attribute some recondite meaning to the words used which readers of the article would not be apt to discover and then proceed to justify on the basis of such meaning being the true one. Neither is the meaning intended by the writer of an article important, unless such meaning is the

natural and obvious one and the meaning that would be conveyed to the readers of the article generally."

Pfister v. *Milwaukee Free Press Co.*, 139 Wis. 627, 651.

Further, respondents through their newspaper, the Milwaukee Journal, after the publication of the libelous matter in its issue of November 4, 1935, admitted its error in attributing fault to petitioner in connection with the bombings. In an article entitled "Out of a Terrible Week" respondents fixed responsibility for all bombings and blackmail tactics on Rutkowski and Chovonec and recanted the claim made in justification in respondents' answer, concluded as follows:

> "Yet there have been times, recently, when law and order have been challenged, not alone by crime, but by those who feel social and economic injustice. There has been a tendency to violence. *It had nothing at all to do with this affair, for this youth* (meaning Rutkowski), *was apparently of no organization or connections. His grudge was that of a warped mind which felt a grievance against society, especially the police.*" (The insertion of Rutkowski's name and the italics are ours (R. 1136, Plaintiff's Exhibit 21; C. 36-39, Bottom pp. 37-40).)

Most important of all is the circumstance that the *pretended defenses of justification were openly abandoned by respondents during the trial and no proof was made by them to connect petitioner with any of the misconduct imputed by the language of the libel of which he complains* (Suppl. Case 226; Bottom p. 400). This abandonment may have escaped the attention of the Supreme Court of Wisconsin. At that stage of the trial it was as plain to everyone who had attended the proceedings as it was to respondents themselves. The defense was not presented because there was no such defense. Petitioner was and is faultless of the offenses mentioned in the libel. Again we invoke the protection of the Fourteenth Amendment of

the United States Constitution, Section 1 in favor of petitioner, a natural born citizen of the United States (C. 71, Bottom p. 72), subject to the jurisdiction thereof of equal protection of the law.

This court has held the equal protection of the laws is a pledge of the protection of equal laws.

State of Missouri ex rel. Lloyd Gaines v. *S. W. Canada,* 305 U. S. 337, 83 L. ed. 208-216.

IV.

In the light of the departures of the Supreme Court of Wisconsin which sought to negative and wholly disregard long settled principles of law in this state applicable to actions of libel, there was not only grievous *injustice done to petitioner; there was also invasion of his right to equal protection of the law guaranteed* by Section 1 of the Fourteenth Amendment to the Constitution of the United States. Again we remind the court that petitioner is a natural born citizen of the United States and subject to the jurisdiction thereof; that he has asked the Supreme Court of Wisconsin to vindicate petitioner's rights herein. It has considered the issue but has denied relief.

Section 1 of Article XIV. of the Constitution of the United States is as follows:

> "SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The federal question here presented is something more than violation of long settled precedents and procedure to

the prejudice of petitioner; it is virtually laying down one rule of law for him and precisely an opposite rule for others. The protection he seeks is a matter of substantive law, right and justice as precious, universal and supreme in its sway and more sacred than any other tenet in the entire range of our judicial system.

Respectfully submitted,

FRANCIS E. MCGOVERN,
Counsel for Petitioner.

(23)

OCT 28 1941

In the

Supreme Court of the United States

October Term, 1941

No. 652

DANIEL W. HOAN,

Petitioner,

vs.

THE JOURNAL COMPANY, HARRY J. GRANT and LAWRENCE C. EKLUND,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

RESPONDENTS' BRIEF OPPOSING GRANT OF WRIT

J. GILBERT HARDGROVE,
ROBERT P. HARLAND,
Counsel for Respondents.

MILLER, MACK & FAIRCHILD
Of Counsel.

SUBJECT INDEX TO BRIEF

PAGE

Introduction 1

Statement of matter involved..... 2

Action for libel in which petitioner was plaintiff and respondents were defendants, based on a newspaper article reporting an interview as to the industrial and labor situation in a neighboring city, containing a statement quoting the interviewed person as saying that the mayor of the city wherein the newspaper was published, that is, the petitioner, was "to blame" for terrorists' bombings of the city's police stations and banks while he, the mayor, traveled about the country telling how well the city was governed. The trial court held that the article was not libelous as meaning to charge that the petitioner was connected as a principal or an accessory with the commission of the crimes which were then the subject of public comment, but was merely a comment and criticism on his law enforcing activities and would be so understood by any intelligent person reading the entire article in the light of the circumstances; and accordingly reversed two answers in the special verdict interpreting the article as containing charges of criminal conduct, and rendered judgment for the defendants notwithstanding the verdict as changed.

No jurisdiction to review..... 5

Petitioner asserts a denial of equal protection of the law by an arbitrary departure from established law for the purposes of this case—tantamount to a charge of judicial dishonesty, which even the petition, read with the opinion of the state court, refutes 5

PAGE

Questions involved 6

Did state court so discriminate against the petitioner in respect either to the substantive or adjective law? 6

No claim under due process clause made or possible 6

No substantial federal question..... 6

In last analysis, the petitioner's claim is, not that the ultimate determination was contrary to substantive law, but that, under the procedural law, the proper time for the determination had passed..... 6

Petitioner failed to raise the question at the proper time, and fails to show how it was raised..... 7

He so failed at three distinct stages in trial court 7

He likewise so failed on original hearing in Supreme Court 8

Objection on rehearing too late..... 8

Petitioner preserved no objection on procedure, and afforded trial court no opportunity to correct on a motion for a new trial..... 10

No valid reason for granting the writ is shown..... 10

1. Under the state law, it was the duty of the court to determine whether the language complained of was susceptible to the interpretation contended for; and that carried the power to direct answers to the first two questions..... 11

2. Under the state law, it was the duty of the court to determine whether there was a jury issue on fair comment, and in deciding that question, to resolve doubts in favor of free criticism and discussion; and that carried the power to direct..... 13

PAGE

3. Under the state law, the power of the court to decide these questions continued up to the entry of judgment, and could have been exercised either by reversing answers or granting judgment notwithstanding the verdict 15

4. Under the verdict as framed, all further questions going to liability were withdrawn in view of the answer to the first question, and might properly have been disregarded for that reason alone..... 18

The return is incomplete; but respondents do not object to the determination, on the present record, of the right to have the writ issue..... 19

Conclusion

No discrimination against petitioner..... 19

Claim of a violation of Fourteenth Amendment groundless and frivolous 19

Fourteenth Amendment does not require trial by jury 20

Petitioner has in fact had a jury trial..... 20

LIST OF CASES

Abbott v. Tacoma Bank of Commerce, 175 U. S. 409.... 6

Chappell Chemical and Fertilizer Company v. Sulphur Mines Company, 172 U. S. 474..... 5

Chybowski v. Bucyrus Company, 127 Wis. 332, 106 N. W. 833 16

Fallbrook Irrigation District v. Bradley, 164 U. S. 112.. 14

Filber v. Dautermann, 28 Wis. 134..... 12

PAGE

Grell v. Hoard, 206 Wis. 187, 239 N. W. 428.....12, 13, 14

Hammacher v. New Berlin, 124 Wis. 249, 102 N. W. 489.. 15

Hay v. City of Baraboo, 127 Wis. 1, 105 N. W. 654..... 16

Hoan v. Journal Co., 238 Wis. 311, 298 N. W. 228..... 12

LaMotte v. Retail Hardware Mutual Fire Insurance Co. of Minnesota, 203 Wis. 41, 233 N. W. 566..... 16

McGeehan v. Gaar, Scott & Co., 122 Wis. 630, 100 N. W. 1072 18

Milwaukee Electric Railway Co. v. Milwaukee, 252 U. S. 100 5

Minnich v. Gardner, 292 U. S. 48..... 9

Missouri ex rel. Gaines v. Canada, 305 U. S. 337..... 4

Patterson v. Colorado, 205 U. S. 454..... 5

Robertson v. Edelstein, 104 Wis. 440, 80 N. W. 724....12, 15

Singler v. Journal Co., 218 Wis. 263, 260 N. W. 431.... 12

Thoe v. Chicago, Milwaukee & St. Paul Railway Company, 181 Wis. 456, 195 N. W. 407..... 16

Wagner Electric Manufacturing Company v. Lyndon, et al., 262 U. S. 226..... 20

Walker v. Sauvinet, 92 U. S. 90..... 20

Walters v. Sentinel Co., 168 Wis. 196, 169 N. W. 564.... 14

York v. Cole, 190 Wis. 179, 208 N. W. 944..... 12

PAGE

WISCONSIN STATUTES

Section 251.264 8

Section 251.37 9

Section 251.38 9

Section 251.39 9

TEXT BOOKS

Bryant Wisconsin Pleading and Practice, 2nd Ed. Vol. III, §484 16

In the

Supreme Court of the United States

October Term, 1941

No. 682

DANIEL W. HOAN,

Petitioner,

vs.

THE JOURNAL COMPANY, HARRY J. GRANT and LAWRENCE C. EKLUND,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

RESPONDENTS' BRIEF OPPOSING GRANT OF WRIT

The petitioner seeks a review of a judgment of the Supreme Court of Wisconsin affirming a judgment of the Circuit Court for Milwaukee County, Wisconsin, dismissing the complaint in an action for libel in which the petitioner was plaintiff and the respondents were defendants.

The opinion of the Supreme Court of Wisconsin (R. 498-515; Rehearing 517-518) is reported as follows:

Hoan v. Journal Co., 238 Wis. 311 (Adv. Sheet No. 4, dated July 21, 1941), 298 N. W. 228.

The petition does not conform either to section 2 of Rule 38 or section 1 of Rule 12; but we shall answer it as though adapted thereto.

STATEMENT OF MATTER INVOLVED

The complaint was based on the following matter appearing in an article published in the Milwaukee Journal, covering an interview with one F. W. Leighton:

> "The mayor of Sheboygan Falls has slight regard for his fellow mayor, Daniel Webster Hoan of Milwaukee, which was shunned by Kinite in its return to the state.
>
> " 'Mayor Hoan travels around the country telling how well Milwaukee is governed,' said the mayor of Sheboygan Falls. 'Meanwhile terrorists bomb Milwaukee's police stations and banks. Mayor Hoan himself is to blame for those bombings.' "

A consideration of that article in its entirety was necessary for an understanding of its spirit and purpose. It also became necessary to review the conduct of the petitioner in the office of Mayor of Milwaukee for a period of nearly twenty-five years, his discharge of the duty to maintain law and order, and lapses therein, a series of bombings which had recently occurred, certain other violence which had occurred over a long period of years, some bombings which had occurred in previous years, and a discussion by Leighton in the course of the interview of the measures which he had taken, the results of which he contrasted with those employed by the petitioner as Mayor of the City of Milwaukee.

The testimony covers 846 pages of transcript (R. 68-145) and the exhibits 92 pages (R. 146-155).

The case was submitted to the jury on a special verdict consisting of 12 questions.

The first and second questions went to the interpretation of the language complained of as containing charges of criminal conduct.

The third, fourth and fifth questions went (a) to its interpretation as containing a charge of neglect in the performance of duty as a public officer, (b) whether that tended to bring him into shame, humiliation and disgrace, and (c) whether it was fair comment.

The sixth to the tenth questions dealt with malice.

The eleventh and twelfth questions dealt with damages, compensatory and punitory.

The verdict was returned in the Circuit Court on June 28, 1940 (R. 44-46, Case 43-45).

The jury found:

(1) that a person of average intelligence and comprehension, reading the entire article, would naturally have understood that it was stated and charged "that the plaintiff was guilty as a *principal* of the crime of malicious destruction of property;"

(2) that such a person would naturally have understood that it was stated and charged "that the plaintiff was guilty as *accessory* before the fact of the crime of malicious destruction of property;"

(3) that such person would naturally have understood the statement to charge him "with such *neglect* in the performance of his duty *as mayor* of the city to preserve the peace and good order of the city, as to charge him with *moral responsibility* for the bombings;"

(4) that the statement tended or calculated to bring the plaintiff into shame, humiliation or disgrace;

(5) that the statement in the light of the article as a whole was not a fair comment on the acts and conduct of the plaintiff in the performance of his duties as mayor;

(6) that in writing the article, Eklund was actuated by malice;

(7) that in publishing the article on November 3rd the Journal Company was actuated by malice;

(8) that in publishing the article on November 4th, the Journal Company was actuated by malice;

(9) that in publishing the article on November 3rd, Grant was actuated by malice;

(10) that in publishing the article on November 4th, Grant was actuated by malice;

(11) that if the court should be of the opinion that the plaintiff was entitled to recover, his compensatory damages should be assessed at $10,000; and

(12) that his punitory damages were $10,000.

The Circuit Court, on October 10, 1940, reversed the answers to the first and second questions which went to the interpretation of the language complained of as containing charges of criminal conduct, and, directed judgment notwithstanding the remaining answers (R. 64-66, Case 63-65), which, except for the assessment of damages, were characterized by the trial judge as relating to "matter of privileged criticism and comment" (R. 52, Case 51).

The Circuit Court judgment was entered on October 11, 1940 (R. 67, Case 66).

The Supreme Court rendered its decision on May 20, 1941 (R. 498-515).

A motion for rehearing was filed on June 6, 1941 (R. 515-516), and decided on July 7, 1941 (R. 517-518).

On the motion for rehearing, the petitioner, for the first time, contended "that in the trial of the action he was denied due process of law and equal protection of the law under the Fourteenth amendment. * * *" (R. 517-518.)

It is not contended here that there was a denial of due process of law. As that claim is not set forth in the petition, it must be deemed abandoned.

There is no reference, specific or inferential, to a deprivation of property without due process of law.

The only decision of this Court cited deals solely with equal protection of the law.

Missouri ex rel. Gaines v. Canada, 305 U. S. 337 (Petitioner's Brief, 39; Petition, 17).

NO JURISDICTION TO REVIEW

Petitioner claims that his right to equal protection of the law, a "title, right, privilege or immunity is [was] specially set up and claimed by either party [in this case, the petitioner] under the constitution," and has been denied. (Petition, p. 17.)

Reduced to its last analysis, the petitioner's sole claim here is that he was denied equal protection of the law because, as he claims, the reversing of these two answers and the granting of judgment to the defendants notwithstanding the verdict amounted, in view of the evidence, to an arbitrary departure from the established and still existing law of Wisconsin; and was "virtually laying down one rule of law for him and precisely an opposite rule for others." (Petitioner's brief, p. 40.)

Petitioner's claim is tantamount to a charge of judicial dishonesty. Anything less would be insufficient on its face to invoke the jurisdiction of this court because the Fourteenth Amendment does not guarantee uniformity of decisions or freedom from error,

> *Milwaukee Electric Railway Co. v. Milwaukee,* 252 U. S. 100.

> [252 U. S. 100, 106] " * * * the Fourteenth Amendment does not in guaranteeing equal protection of the laws, assure uniformity of judicial decisions, *Backus v. Fort Street Union Depot Co.,* 169 U. S. 557, 569, any more than in guaranteeing due process it assures immunity from judicial error, *Central Land Co. v. Laidley,* 159 U. S. 103; *Tracy v. Ginzberg,* 205 U. S. 170. * * *"

> *Patterson v. Colorado,* 205 U. S. 454, 461;

nor would the abridgement of the right to a jury trial infringe the "equal protection" clause of the Fourteenth Amendment.

> *Chappell Chemical and Fertilizer Company v. Sulphur Mines Company,* 172 U. S. 474, 475.

It is submitted the most cursory reading of the petition and brief together with the opinion of the State Supreme Court discloses that petitioner's grave charge is wholly and completely without support. There is no substantial federal question presented and hence no jurisdiction for review.

QUESTIONS PRESENTED

The fundamental question presented is this:

Did the courts of Wisconsin discriminate against the petitioner in violation of the Fourteenth Amendment?

That involves certain subsidiary questions.

These are:

1. Did the Wisconsin law leave it to the court to determine in libel cases whether the language complained of is susceptible to the interpretation contended for?

2. Did the law of Wisconsin leave to the court, under the circumstances presented by the evidence, the determination of the question whether the language was used in the exercise of the right of fair comment?

3. Under the Wisconsin law, were these powers lost to the court once the case was submitted to the jury?

The petitioner makes no claim of deprivation of property without due process of law. There could be no such claim in a libel action, since the action does not involve property.

Abbott v. Tacoma Bank of Commerce, 175 U. S. 409, at 413 and 414.

NO SUBSTANTIAL FEDERAL QUESTION

The petitioner has not furnished a statement showing the grounds upon which he contends that the questions involved are substantial, as he was required to do under Rule 12.

We will assume that, if the courts of Wisconsin deliberately and dishonestly discriminated against the petitioner in

respect to the substantive law of that state, there might be presented a substantial federal question.

That is not this case.

The ground upon which the petitioner claims a right to review is that, while the judicial action (i. e., determining whether the language used was susceptible to the interpretation contended for, and whether it constituted justifiable comment) could have been taken at some earlier stage in the trial, it could not, conformably to the Wisconsin law, be taken at a later stage (Petitioner's Brief, p. 26). That presents no substantial federal question.

If that action could properly have been taken at any stage, the failure to act at any given stage before judgment would not be a matter going to substance. If the ultimate determination is in accordance with the substantive law of the state, and due process has been accorded, a mere variation from a rule of procedure would not present a substantial federal question on denial of the equal protection of the law.

PETITIONER FAILED TO RAISE FEDERAL QUESTION AT THE PROPER TIME: AND FAILS TO SHOW HOW IT WAS RAISED.

The petitioner does not state the precise manner in which he claims that he was denied equal protection of the law or discriminated against.

He suggests, rather than states, that the court arbitrarily departed from the fixed and still existing libel laws of the state, and from fixed and still existing rules of state court practice in the trial of jury cases.

If the petitioner's position were sound, the objection could have been raised at any of the following stages:

(1) In opposing the defendants' motions for a directed verdict (R. 145, Case 144; R. 447, Supp. Case 273);

(2) in opposing the defendants' alternative motions after the return of the verdict to change answers, and

for judgment notwithstanding the verdict (R. 46-50, Case 45-49);

(3) on the order to show cause why the decision of the trial court as first announced should not be modified before the entry of a formal order (R. 55-64, Case 54-63; and

(4) on the assignment of error required to be incorporated into the appellant's brief on the original presentation in the State Supreme Court.

If the petitioner had a right under the Fourteenth Amendment to demand that this case be submitted to the jury, he should have raised the question in opposing the motion to direct a verdict.

If he had a right, under the Fourteenth Amendment, to demand that judgment be entered on the verdict, once it was rendered, it was his duty to raise the question in opposing the alternative motions to change the answers and for judgment notwithstanding the verdict.

If he desired to challenge any action that the court might take at that stage before judgment as being a violation of the Fourteenth Amendment, it was his duty to raise the question so that the trial court might avoid error if any there were.

He had three opportunities to raise the question in the trial court.

The appeal to the Supreme Court in Wisconsin is taken on a very simple notice addressed to opposing counsel and the Clerk of the trial court (R. 495-496).

There is no provision at that stage for a specification of the grounds for the appeal. There is, however, a provision for an assignment of the errors relied upon. It is found in the Supreme Court Rules, printed as part of the Wisconsin Statutes for 1939, and reads as follows:

"[251.264] *Rule 10.* (As amended August 9, 1921.) The brief of appellant or plaintiff in error shall contain a concise statement of the nature of the action and the

> issues involved, the result of the trial in the court below, *the errors relied upon,* the leading facts or conclusions which the evidence tends to prove, the principles of law applicable and the authorities in support thereof, giving the names of both plaintiff and defendant, number, name, and page of report each time the case is cited."

The appellant's brief has not been returned in the record. Neither does the record show the assignment of errors embodied therein. We submit, therefore, that the record does not show when and how the federal question was raised, and that for that reason alone, the petition must be denied.

The *per curiam* memorandum disposing of the motion for rehearing indicates that the question was raised for the first time on a motion for rehearing.

We respectfully submit that at that stage it came too late.

Minnich v. Gardner, 292 U. S. 48, at 53.

The motion for rehearing does not disclose the ground on which it was based (R. 516). It follows, therefore, that the *method* of raising the federal question is not shown in accordance with subsection 1 of Rule 12. There were no quotations of specific portions of the record where the matter appears. It can appear nowhere except in the printed argument in support of the motion for a rehearing. The pertinent rules on this subject are the following:

> "[251.37] *Rule 37.* (As amended June 29, 1933.) Every motion for a rehearing shall be filed within twenty days after the decision, and the clerk shall retain the papers till the expiration of such period, unless all parties interested consent to sooner remit the same.
>
> "[251.38] *Rule 38.* The papers in any cause wherein a motion for a rehearing is made shall be retained until the motion shall have been disposed of.
>
> "[251.39] *Rule 39.* (As amended January 11, 1913.) A motion for a rehearing shall not be argued orally, but *shall be submitted on printed arguments,* of which twenty copies shall be furnished to the clerk."

This printed argument has not been returned as part of the record.

That makes it impossible to comply with Rule 12.

PETITIONER FAILED TO PRESERVE ANY OBJECTION ON PROCEDURE

The petitioner made no request for the submission of any of the issues embodied in the questions going to liability.

He requested the court to submit the case on a special verdict which did not embody any of the issues under questions 1 to 5 (R. 40-42, Case 39-41).

He objected to the submission of question 3, first tentatively numbered 5 (R. 456-458, Case 282, 284).

He did not, as did the defendants, move for a new trial in the event that his motion for judgment should not be granted (for illustration, see No. 12 of defendants' motions, R. 50-51, Case 49-50).

Nor did he make any such motion following the handing down of the opinion of the trial court, although he did move to strike out a portion thereof (R. 55-56, Case 54-55).

If the trial court erred, not in a matter of substance but in a matter of procedure, by making a determination on a motion after verdict which ought to have been made before the submission of the verdict, then surely, he should not be heard in this Court in the absence of a motion for a new trial in the state court.

NO VALID REASON FOR GRANTING WRIT

The trial court determined that the language complained of was not susceptible to the interpretation that it charged crime, that, correctly interpreted, it consisted merely of a justifiable comment on the activities of the petitioner as a public officer, changed the answers carrying the interpreta-

tion of a charge of crime, and then rendered judgment notwithstanding the verdict.

1.

Under the Wisconsin Law, It Was the Duty of the Court to Determine Whether the Language Complained of Was Susceptible to the Interpretation Contended For.

The defendants objected to the submission of questions 1 and 2 (R. 459, Supp. Case 285). As to each of these questions, they also asked that if it be submitted, it be submitted with the inclusion of a directed answer (as to question 1, R. 451, Supp. Case 277; as to question 2, which had tentatively been framed as 3, R. 452, Supp. Case 278; and again as to both, R. 453, Supp. Case 279).

Before the framing of the special verdict, the defendants had moved for a directed verdict (R. 447-448, Supp. Case 273-274).

After the return of the verdict, the defendants moved that the answers to these two questions be changed. Thus, at every stage, the court was asked to determine whether the language complained of was susceptible to the interpretation contended for.

It had been the established law of Wisconsin for nearly seventy years that this is a question for the court; and we shall presently point out that in his brief in this court, the petitioner concedes that this was a question for the court.

The trial judge, in passing on the motions to change the answers to these questions, said:

> "All of the facts and circumstances tending to throw light upon the propositions involved in the first and second questions point unmistakably to the conclusion that a person of average intelligence and comprehension, who read the entire article in which the language in question appeared could not reasonably have understood the language complained of to convey the meaning that

plaintiff was guilty of the crime, either as principal or accessory, of malicious destruction of property." (R. 54; Case 53.)

This was quoted and approved by the Supreme Court of Wisconsin (R. 507-509).

The Supreme Court said:

> "The court determines whether a communication is capable of a defamatory meaning while it is the function of the jury to determine whether a communication capable of a defamatory meaning was so understood by its recipient." (R. 514.) (238 Wis. 329.)

This it was declared had been the law of the state since 1871. In support of its conclusion, the Supreme Court cited the following authorities:

Filber v. Dautermann (1871), 28 Wis. 134;
Grell v. Hoard (1931), 206 Wis. 187, 239 N. W. 428;
Singler v. Journal Co. (1935), 218 Wis. 263, 260 N. W. 431.

To this we add:

Robertson v. Edelstein (1899), 104 Wis. 440, 443, 80 N. W. 724; and
York v. Cole (1926), 190 Wis. 179, 208 N. W. 944.

It is the duty of the court in Wisconsin to determine whether or not the words complained of could naturally and reasonably be interpreted as defamatory.

York v. Cole, 190 Wis. 179, 208 N. W. 944.

> [190 Wis. 181, 182] "It has been often held that if there be but one reasonable construction that can be given to the words used it is for the court to say whether or not such be libelous, * * *. [Citing cases]"

Singler v. Journal Co., 218 Wis. 263, 260 N. W. 431.

[218 Wis. 268, 269] "* * * If the meaning of the publication is clear and unambiguous, *the issue is for the court. Williams v. Hicks Printing Co.*, 159 Wis. 90, 150 N. W. 183; *York v. Cole*, 190 Wis. 179, 208 N. W. 944; *Arnold v. Ingram*, 151 Wis. 438, 138 N. W. 111; *Leuch v. Berger*, 161 Wis. 564, 155 N. W. 148; *Putnam v. Browne*, 162 Wis. 524, 155 N. W. 910. * * *" (Italics ours.)

The petitioner concedes in this court the power, propriety and right of the trial judge to determine whether the language complained of is susceptible to the interpretation contended for by the plaintiff. He says:

> "At the trial no one doubted the power or propriety of the trial judge to say whether or not the libelous language published by the defendants was susceptible of the meaning attributed to it by the plaintiff, but that it was for the jury to say whether such was the true meaning of the language used." (Petitioner's Brief, 26.)

Since it was the duty of the court to determine whether the language complained of was susceptible of a libelous interpretation, it was the duty of the court to exercise that power in connection with the first two questions in the special verdict. If convinced that the language was not susceptible to such an interpretation, it was the duty of the court (a) to direct a verdict, (b) to direct the answers to be given to these two questions, and (c) to change the answers on the motions following the verdict.

2.

Under the Wisconsin Law, It Was the Duty of the Court to Determine Whether There Was a Jury Issue on Fair Comment, and In Deciding That question, to Resolve Doubts in Favor of Free Criticism and Discussion.

This principle had been followed nearly ten years before in *Grell v. Hoard* (1931), 206 Wis. 187, 239 N. W. 428. In that case the court had said:

> [206 Wis. 192] "We feel that in doubtful cases the doubt should be resolved in favor of free criticism and discussion."

That case was cited by the trial judge in his decision on motions after verdict (R. 52-55, Case 51-54).

The Supreme Court cited it and quoted from it for the purpose of showing the then existing law of Wisconsin (R. 507, 508, 511).

The petitioner contends that the decision is not applicable, and argues that the Supreme Court of Wisconsin erred in the view that it established the law on this question (Petitioner's Brief, 34-36).

It is for the Supreme Court of Wisconsin to say what the Wisconsin law on the subject is, and what it was at the time that the decision was rendered.

That is not a question for this court.

The Fourteenth Amendment does not transform this court into a court of appeal where all decisions of state courts involving merely questions of general justice can be reviewed.

> *Fallbrook Irrigation District v. Bradley,* 164 U. S. 112, 157.

That the petitioner is simply asking this court to review the decision of the Wisconsin Supreme Court on a matter of Wisconsin law is emphasized further by the reference to *Walters v. Sentinel Co.* (1918), 168 Wis. 196, 169 N. W. 564 (Petitioner's Brief, 34).

The argument based on that case was considered and answered by the Wisconsin Supreme Court (R. 153).

Hence it follows that it was for the Supreme Court of Wisconsin to determine whether there was any jury issue on fair comment.

3.

Under the Wisconsin Law, the Power of the Court to Decide These Questions Continued Up to the Entry of Judgment.

The petitioner argues that the court, having submitted the issues to the jury, lost its power further to control the matter by changing the answers in the verdict or granting judgment *non obstante* where it determines that there is no evidence to support the verdict. Thus he says:

> "So the judge functioned completely in his right to determine whether or not the libelous language complained of was susceptible of the interpretation placed upon it by the plaintiff." (Petitioner's Brief, 27.)

The power and duty of the trial judge to determine that question continued until the entry of the judgment.

Robertson v. Edelstein (1899), 104 Wis. 440, 80 N. W. 724.

> [104 Wis. 443, 444] "If it appear that the expression as used could not naturally and reasonably be understood by people of ordinary understanding to charge the crime, it becomes the duty of the court to hold it not slanderous, *whether presented on demurrer or by proof upon the trial. Montgomery v. Deeley,* 3 Wis. 709; *Campbell v. Campbell,* 54 Wis. 90; *Bradley v. Cramer,* 59 Wis. 309; *Schild v. Legler,* 82 Wis. 73, 75; *Pandow v. Eichsted,* 90 Wis. 298; * * *" (Italics ours.)

And where the Court should have directed a verdict but failed to do so, it is its duty to grant a motion for judgment notwithstanding the verdict where the jury errs.

Hammacher v. New Berlin (1905), 124 Wis. 249, 102 N. W. 489.

> [124 Wis. 253] "* * * Upon the undisputed facts, therefore, he was not entitled to recover, and a verdict for the defendant should have been directed. *Failing in this, the court properly granted judgment for the defendant notwithstanding the verdict. Muench v. Heinemann,* 119 Wis. 441, 96 N. W. 800." (Italics ours.)

Similarly where the verdict is contrary to the evidence it may be changed to correspond with the facts, and judgment rendered thereon as changed; or, judgment may be rendered notwithstanding the verdict.

Hay v. City of Baraboo (1906), 127 Wis. 1, 105 N. W. 654;

Chybowski v. Bucyrus Company (1906), 127 Wis. 332, 106 N. W. 833;

LaMotte v. Retail Hardware Mutual Fire Insurance Company of Minnesota (1931), 203 Wis. 41, 233 N. W. 566.

In fact, if the legislature adopted a rule in accordance with petitioner's contention, it probably would be unconstitutional as an undue invasion of the power of the courts. (See *Thoe v. Chicago, Milwaukee & St. Paul Railway Company* (1923), 181 Wis. 456, 195 N. W. 407.)

In other words, the procedure followed by the trial court in changing the answers to questions 1 and 2 and ordering judgment for the defendants notwithstanding the answers to questions 3 to 12, as well as the judgment rendered in accordance therewith, was "due process of law," and it was strictly in accordance with rules and principles long established and followed by the courts of Wisconsin in similar cases as shown by the cases cited above. Text books on procedure and practice point out this practice.

Bryant Wisconsin Pleading and Practice, 2nd Ed. Vol. III, Sec. 484:

> "* * * But an answer may be changed by the court if there is no evidence to support it or it is contrary to all the evidence, or practically without support in the evidence. * * *" [Numerous cases are cited.]

The court was acting in strict accord with rules of law long established in Wisconsin.

The court in no manner discriminated against the peti-

tioner. It acted in his case precisely as it was required to act, and as it had acted in other cases.

In Wisconsin today, the bar and the bench prefer the submission of cases under the special verdict. The judges and the bar habitually analyze cases with a view to ascertaining the ultimate issues involved and are adept in so framing the special verdict as to present those issues and thus to dispose of the case.

The juries are not compelled to acquire a knowledge of the law applicable to a given case, and then to analyze the various issues of fact and to set up the varying hypotheses upon which to make their application of the law in arriving at a result. They are relieved of a great deal of work which is very difficult for anyone except a judge trained in the law.

The special verdict should cover every material disputed issue of fact. The verdict can and should be so framed that each question will admit of a direct answer, and that, whatever answers be returned to the questions, but one judgment may follow thereon.

The answer to one question may eliminate the necessity of a consideration of others, and these others may be submitted to be answered only if a given answer shall have been made to the one preceding.

The test as to the sufficiency of the evidence to support the finding of the jury on any one of the issues submitted is the same as that presented in determining the sufficiency of the evidence to support a general verdict.

In practice, it has been found that when a case is submitted under the special verdict, the court may, with greater safety, reserve doubtful questions of fact and law for further consideration on motions to be heard after the verdict. These motions are substantially the same in principle as those which may be made after a general verdict. The special verdict frequently eleminates the necessity for a new trial. The finding of the jury on each question may be re-

considered on a motion for judgment notwithstanding the verdict; and *in Wisconsin that motion is open to the defendant as well as to the plaintiff.*

Each party may submit requests as to the issues to be covered in the special verdict. If, as to any issue, there is a failure to ask the submission of a question, that issue is thereby submitted to the court, and, in the absence of an express ruling, is deemed to have been decided by the court in the manner required to sustain the judgment which is finally entered.

4.

Questions 2 to 5 Were Withdrawn From the Jury By Their Affirmative Answer to Question 1; and It Would Have Been Proper to Change the Answer to Question 1 From Yes to No, and to Enter Judgment Dismissing the Complaint.

Questions 2, 3, 4 and 5 were submitted to the jury only if they answered each preceding question in the *negative.* They answered question 1 *affirmatively.* This removed from their consideration questions 2 to 5.

McGeehan v. Gaar, Scott & Co. (1904), 122 Wis. 630, 100 N. W. 1072.

[122 Wis. 634] "* * * *The fifth question was only* submitted to the jury in a certain contingency, i. e., *if they had already answered the fourth question, and answered it in the affirmative.* Inasmuch as it appears that *they answered the fourth question in the negative,* it is evident that *the fifth question was never submitted to them by the court, and the question and answer drop entirely from the case and may be disregarded."* (Italics ours.)

Under these circumstances it would have been proper to change the answer to question 1 from "Yes" to "No," to disregard the answers to questions 2 to 5 inclusive, and to enter judgment dismissing the complaint.

The disregard of the court's direction led to one very illogical result.

The jury interpreted the article, in the answer to question 1, as charging the plaintiff with *participating as a principal* in the bombings; in the answer to question 2, as being *his own accessory;* and in the answer to question 3 as having been so *negligent* as a mayor as not to have prevented his own criminal acts.

RETURN INCOMPLETE

The return from the Supreme Court of Wisconsin does not actually contain the transcript in that court. It contains merely the printed case and a supplement thereto. These are not prepared by the court. They are prepared by counsel for the respective parties.

The fact that they do not contain all that is in the transcript is apparent from the references to the record.

We have no objection to having the court determine the right to a review on this printed record; but take this occasion to say that if a writ were granted, we would insist, either that the original record be transmitted, or that the printed record be supplemented by abstracts of certain portions thereof.

CONCLUSION

There has been no discrimination by the Wisconsin courts against the petitioner either in the determination of the substantative law as to his claim or in the procedure afforded the plaintiff to test his claim. The Wisconsin court in testing the sufficiency of the evidence to support the jury's answers to the questions of the special verdict acted in accordance with the long established law of Wisconsin. Petitioner's claim of an invasion of his right to equal protection of the law guaranteed by the Fourteenth Amendment is

wholly groundless and frivolous. It is submitted that the situation here presented is not unlike that presented in *Wagner Electric Manufacturing Company v. Lyndon, et al.*, 262 U. S. 226, where this court dismissed an appeal "because the grounds of the appeal are frivolous" and imposed a $1,500 penalty and costs on the appellant, holding that the direction of a verdict by a trial court was not a denial of any rights under the federal constitution.

> [262 U. S. 226, p. 232] "* * * More than this, even if it were held that the direction deprived the defendant of the right of trial by jury (a holding shown to be erroneous by *Treat Manufacturing Co. v. Standard Steel & Iron Co.*, 157 U. S. 674), still the deprivation of a right of trial by jury in a state court does not deny the parties due process of law under the Federal Constitution. *Walker v. Sauvinet*, 92 U. S. 90; *Missouri v. Lewis*, 101 U. S. 22, 31; *Twining v. New Jersey*, 211 U. S. 78, 110, 111; *Minneapolis & St. Louis R. R. Co. v. Bombolis*, 241 U. S. 211, 217. * * *"

The petitioner has had a trial by jury although it is clear that no right secured to him by the Fourteenth Amendment would have been infringed if he had not had a trial by jury.

Walker v. Sauvinet, 92 U. S. 90.

> [92 U. S. 90, 92] "* * * A trial by jury in suits at common law pending in the State courts is not, therefore, a privilege or immunity of national citizenship, which the States are forbidden by the Fourteenth Amendment to abridge. A State cannot deprive a person of his property without due process of law; but *this does not necessarily imply that all trials in the State courts affecting the property of persons must be by jury.* This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings. *Murray's Lessees v. Hoboken L. & I. Co.*, 18 How. 280. Due process of law is process due according to the law of the land. This process in the States is regulated by the law of the State. * * *"

We respectfully submit that the petition for a writ of certiorari should be denied.

J. GILBERT HARDGROVE,
ROBERT P. HARLAND,
Counsel for Respondents.

MILLER, MACK & FAIRCHILD
Of Counsel.

SUBJECT INDEX TO REPLY BRIEF.

	Page
Preliminary statements	1
Petition and record conform to rules	2
Petitioner does not charge judicial dishonesty	2
Petitioner charges error by Wisconsin Courts in violation of Section 1 of Article XIV of Federal Constitution	3
Petitioner deprived of property in libel action at bar without due process by Wisconsin Courts	5
Newspaper article defamatory and questions of verdict for jury only	8
Section 1, Article XIV, Federal Constitution, applicable to Courts of Wisconsin	9
Petitioner's invocation of Section 1, Article XIV, Federal Constitution, timely	9
Equal protection of laws issue fully covered in petitioner's brief submitted with petition	9
Petitioner's privileges and immunities abridged	9
Conclusion	10

List of Cases.

Abbott v. *Tacoma Bank of Commerce*, 175 U. S. 409, 413-414	5
Berry v. *U. S.*, 312 U. S. 450	8
Conway v. *O'Brien*, 312 U. S. 492	8
Fidelity & Deposit Co. of Maryland v. *Areny*, 290 U. S. 66	
Hoan v. *Journal Co., et al.*, 238 Wis. 311, 298 N. W. 228	1
Hurtado v. *California*, 110 U. S. 535	3
Minnich v. *Gardner*, 292 U. S. 48, 53	9
Mooney v. *Holohan*, 294 U. S. 104	9
Pearson v. *McGraw*, 308 U. S. 313, 318	9
Walker v. *Saurnviet*, 92 U. S. 92	3, 9

CONSTITUTIONAL PROVISIONS.

A. Federal.

Page

Sect. 1, Article XIV 3, 4, 5, 7, 9, 10

B. Wisconsin.

Sections 3, 5, 9 and 22 of Article I 6, 7
Section 13 of Article XIV 7

Wisconsin Statutes, 1939.

Section 270.07 7
Section 270.32 7

Dictionaries.

Ballentine's Law Dictionary, 1930, pp. 345-346 8
Bouvier's Law Dictionary, Rawles Third Revision, p. 814 8
Oxford English Dictionary, Vol. 1, pp. 888-889 8
Oxford English Dictionary, Vol. 3, p. 125 8
Webster's New International Dictionary of the English Language, 1935, pp. 283, 686 8

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 682

DANIEL W. HOAN,

Petitioner,

vs.

THE JOURNAL COMPANY, HARRY J. GRANT AND LAWRENCE C. EKLUND,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN, U. S. A.

PETITIONER'S REPLY BRIEF.

Preliminary Statements.

In this brief we confine ourselves to a reply to Respondents' Brief Opposing Grant of Writ.

The decision of the Supreme Court of Wisconsin, which is set forth at pages 498 to 515 and 517 to 518 of the transcript of the record filed herein, is reported at 238 Wis. 311 and at 298 N. W. 228.

Petition and Record Conform to Rules.

It is respectfully submitted that the petition for certiorari addressed to the Supreme Court of the United States and the transcript of the record conform to the rules of this Court. We forego further argument as to this, as we deem the statements made on pages 2 and 19 of respondents' brief to be waivers of oversights in these respects, if any, as alleged by respondents. No violation of the rules is pointed out specifically. It should be borne in mind that at this stage of the proceedings we are dealing only with an application for a writ of certiorari. We quote from page 19 as follows:

> "We have no objection to having the court determine the right to a review on this printed record; but take this occasion to say that if a writ were granted, we would insist, either that the original record be transmitted, or that the printed record be supplemented by abstracts of certain portions thereof."

If a writ is granted the petitioner will, of course, comply fully with any rule of this Court pertaining to the record and will cooperate to the fullest extent with the respondent in this respect, all to the end that the real issues may be fully and fairly presented to this Court, with brevity.

Petitioner Does Not Charge Judicial Dishonesty.

We quote from page 5 of respondents' brief as follows:

> "Petitioner's claim is tantamount to a charge of judicial dishonesty."

By this is meant "judicial dishonesty" on the part of the Supreme Court of Wisconsin and, it may be, on the part of the Circuit Court of Milwaukee County. In speaking of the trial of the action we cannot exclude the trial in either court. We make no such charge against those courts, or either of

them. If we have unintentionally used any words, written or spoken, or done anything, open to such a construction, and we are confident we have not, we withdraw the same. We respectfully submit that there is nothing in the record to sustain this contention of the respondents.

At page 5 of their brief, respondents argue that "Anything less" than "a charge of judicial dishonesty" "would be insufficient on its face to invoke the jurisdiction of this Court because the Fourteenth Amendment does not guarantee uniformity of decisions or freedom from error." The cases there cited in support of this are, we respectfully submit, distinguishable from the case at bar.

At page 6, respondents argue that petitioner's "grave charge" of "judicial dishonesty" is without support and that no Federal question is presented to give this Court jurisdiction for review. As heretofore stated petitioner makes no charge of "judicial dishonesty" on the part of any court.

Petitioner Charges Error by Wisconsin Courts in Violation of Section 1 of Article XIV of Federal Constitution.

We do respectfully charge that both Wisconsin courts committed error to the prejudice and damage of the petitioner and in violation of provisions of Section 1 of Article XIV of the Federal Constitution, as more particularly pointed out in the petition, brief in support thereof, and this reply brief.

At page 2 of the petition, there is made a charge "of arbitrary invasion of the constitutional rights of petitioner by the Supreme Court of the State of Wisconsin in a case that came before it on appeal from a judgment of the Circuit Court of Milwaukee County" wherein it violated the law of Wisconsin pertaining to jury trials. The law of the State is synonymous with the law of the land. *Hurtado* v. *California*, 110 U. S. 535, and *Walker* v. *Sauvinet*, 92 U. S. 92. This latter case is cited at page 20 of respondents'

brief. Therefore this charge is, in substance and effect, a charge of denial of due process of law, which is guaranteed by Section 1 of Article XIV of the Federal Constitution. At page 2, there is also made a similar charge as to equal protection of the laws. At page 11, it appears, in substance and effect, that all of this Section of this Article has been invoked and relied upon and also specifically the guarantee of the equal protection of the laws contained therein. At page 13, this guarantee is repeatedly invoked and relied on, with an assurance that they will be further considered with authorities in the brief attached to the petition; and the decision of the Wisconsin Supreme Court to the effect that the petitioner was not denied due process of law and the equal protection of the laws under Article XIV of the Federal Constitution is there fully set forth. At pages 15, 16, 17, 19, 20 and 21, the equal protection of the laws provision of this Article and also the petitioner's fundamental and constitutional rights and the whole of the first clause of this Article, which is Section 1, are repeatedly invoked and relied on. The prayer for relief of the petition, at page 22, is broad enough to cover any relief afforded by Section 1 of Article XIV. At pages 31, 36 and 39 of the brief attached to the petition, in keeping with the assurance of the petition, the guarantee of the equal protection of the laws is invoked and relied on and, at page 39, all of section 1 is set forth fully, invoked and relied on. Under its provisions the State of Wisconsin was and is prohibited from (1) abridging petitioner's privileges or immunities, (2) depriving him of life, liberty or property without due process of law, and (3) denying him the equal protection of the laws. Hence, there are presented Federal questions as to all of these prohibitions against the State of Wisconsin.

The foregoing is a complete answer to respondents' contention, at page 6 of their brief, to the effect that petitioner makes no claim of deprivation of property without due proc-

ess of law. There are indications that they are not confident of their position in making this contention since, at page 20 of their brief, they make contentions which are open to the construction that none of petitioner's rights under the Federal constitution have been violated, including his right to due process of law; and they there cite, and quote extensively from, reports of cases containing language which deals specifically with due process of law. It is respectfully submitted that the cases thus dealt with or mentioned in any way at page 20 are distinguishable from the case at bar. There are implications, language and dicta in some of these cases, at least, which tend to support petitioner's position in the case at bar.

Petitioner Deprived of Property in Libel Action at Bar Without Due Process by Wisconsin Courts.

At page 6 of respondents' brief, it is urged that there can be no claim of a deprivation of property without due process of law in a libel action since the action does not involve property. *Abbott* v. *Tacoma Bank of Commerce,* 175 U. S. 409, at 413 and 414, which is the only case cited in support of such contention, is distinguishable from the case at bar; and the court did not reject or disparage the view that reputation is property. In the case at bar, the Circuit Court of Milwaukee County rendered and entered a judgment of $195.58 for costs in favor of respondents and against petitioner and dismissing his complaint on its merits, on October 11, 1940. (Transcript of Record 495-496.) It is respectfully submitted that this $195.58 is property within the meaning of Section 1 of Article XIV of the Federal Constitution. See *Fidelity & Deposit Co. of Maryland* v. *Arenz,* 290 U. S. 66, and Byrnes Law Dictionary, 1923, page 709. Furthermore, the verdict of the jury assessed petitioner's compensatory damages at $10,000 and his punitory damages at $10,000 after making other findings of fact entitling him

to a judgment for these amounts, $20,000 in all. (Transcript of Record 506-507.) Previous to the entry of judgment, stipulations of facts were entered into by the petitioner and respondents, in effect, establishing the falsity of the libelous matter in question and exonerating petitioner from blame for the bombings in question. Such exoneration was too late. The damage was done. (Petition 4-6.) It is likewise respectfully submitted that this $20,000 is property within the meaning of this Section 1. It is also respectfully submitted that the judgment dismissing the petitioner's complaint on its merits and awarding respondents costs payable by him to them in the amount of $195.58 deprived him of property in this amount and in the amount of $20,000, without due process of law.

The Wisconsin Constitution provides as follows:

"ARTICLE I.

Declaration of Rights.

* * * * * * *

Free speech; libel. Section 3. Every person may freely speak, write and publish his sentiments on all subjects, *being responsible for the abuse of that right,* and no laws shall be passed to restrain or abridge the liberty of speech or of the press. * * *

* * * * * * *

Trial by jury; verdict in civil cases. Section 5. *The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy;* but a jury trial may be waived by the parties in all cases in the manner prescribed by law. * * *

* * * * * * *

Remedy for wrongs. Section 9. Every person is entitled to a certain remedy in the laws *for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice* * * * *completely and without denial,* * * * *conformably to the laws.*

* * * * * * *

Maintenance of free government. Section 22. The blessings of a free government can only be maintained by a firm

adherence to justice, moderation, temperance, frugality and virtue, *and by frequent recurrence to fundamental principles.*

* * * * * * *

ARTICLE XIV.

* * * * * * *

Common law continued in force. Section 13. Such parts of the common law as are now in force in the territory of Wisconsin, not inconsistent with this constitution, shall be and continue part of the law of this state until altered or suspended by the legislature."

We quote from the Wisconsin Statutes, 1939, as follows:

"270.07. Issues, by whom tried, when tried. (1) An issue of fact in an action for the recovery of *money only,* * * * *must be tried by a jury* except as otherwise provided in this chapter and except that equitable defenses or counterclaims are triable by the court. * * *

270.32. Jury trial, how waived. Trial by jury may be waived by the several parties to an issue of fact by failing to appear at the trial, or by written consent filed with the clerk; or by consent in open court, entered in the minutes." (Italics supplied.)

Petitioner did not waive a trial by jury. The respondents *abused* the freedom of the press by libeling petitioner. He was thereby injured and wronged in his person, property and character, for which he sought redress in the courts of Wisconsin. He was entitled to a trial by jury under the law of Wisconsin, constitutional and statutory, which is the law of the land, or due process of law, in the case at bar. He was denied due process of law, in violation of Section 1 of Article XIV of the Federal Constitution, by the denial of his right to a trial by jury in two respects. Two answers made by the jury to questions in the special verdict were changed by the courts and judgment was entered against

him and in favor of respondents, notwithstanding that all of the ten remaining answers made by the jury to questions in the special verdict were permitted to stand, and notwithstanding that it was well established that the defamatory language in question published by respondents about him was false.

Newspaper Article Defamatory and Questions of Verdict for Jury Only.

The language of the newspaper article *charging petitioner "himself" with blame for bombings of Milwaukee's police stations and banks by terrorists* was defamatory. Thus *blaming* petitioner for such *bombings* amounted to charging him with fault and *responsibility* and being *answerable* for these *bombings* and with *wrong* and *culpability* and *accusing* him of them. See Webster's New International Dictionary of the English Language, 1935, at pages 283 and 686; the Oxford English Dictionary at page 125 of Volume 3 and pages 888-889 of Volume 1; Bouvier's Law Dictionary, Rawle's Third Revision, at page 814; and Ballentine's Law Dictionary, 1930, at pages 345-346. These charges made against the petitioner in this libelous newspaper article are most serious charges. They were fully justified in answering all of the questions of the special verdict as they did.

Petitioner was entitled to have these questions of fact, particularly questions 1 and 2, finally answered by a jury of his *peers,* and not by distinguished judges of courts of law highly trained and experienced in the refinements and technicalities of the law. The right of such trial by jury is an ancient and valuable right, sacredly guarded and handed down through the ages. If Wisconsin courts can invade the province of jurors, as was done here, "the law of the land" contained in plain provisions of the Wisconsin Constitution and statutes have no meaning. See *Berry* v. *U. S.,* 312 U. S. 450, and *Conway* v. *O'Brien,* 312 U. S. 492. "Ques-

tions of due process are not to be treated 'narrowly or pedantically in slavery to forms or phrases'." *Pearson* v. *McGraw*, 308 U. S. 313, 318.

Section 1, Article XIV, Federal Constitution, Applicable to Courts of Wisconsin.

The provisions of Section 1 of Article XIV of the Federal Constitution are binding as limitations upon the executive, legislative and *judicial* branches of the State governments and upon agencies of the states *Mooney* v. *Holohan*, 294 U. S. 104.

Petitioner's Invocation of Section 1, Article XIV, Federal Constitution, Timely.

At page 9 of their brief, respondents contend that the raising of a Federal question by petitioner was not timely. The case there cited in support of this contention, *Minnich* v. *Gardner*, 292 U. S. 48, at 53, is distinguishable. The issues of equal protection of the law and due process of law were raised on a motion for rehearing before the Supreme Court of Wisconsin and decided adversely to petitioner. This was the first time that he found that it was necessary to raise them. We respectfully submit that the raising of these questions was timely; and that respondents' contention to the contrary is highly technical and untenable.

Equal Protection of Laws Issue Fully Covered in Petitioner's Brief Submitted With Petition.

In petitioner's brief, submitted with the petition, respondents' argument on the issue of equal protection of the laws was anticipated and dealt with.

Petitioner's Privileges and Immunities Abridged.

Upon the question of abridgement of privileges or immunities, *Walker* v. *Saunivet*, 92 Wis. 92, cited in respond-

ents' brief and dealt with elsewhere in this brief, is distinguishable. We respectfully submit that petitioner's privilege of having a trial of his case by a jury and his right to be immune from damage by libel without redress have been abridged in violation of Section 1, Article XIV, of the Federal Constitution notwithstanding precedents, if any, adverse to petitioner on these issues.

In Conclusion.

We have examined all of the cases cited in respondents' brief and, in connection with them, all of the cases cited in the decision of the Supreme Court of Wisconsin and by the Circuit Court of Milwaukee County; and we respectfully submit that there is nothing in them or in the record to overcome the error here complained of or to prevent the granting by this Court of petitioner's application for a writ of certiorari and that cases tending to the contrary, if any, should be overruled.

Respectfully submitted,

FRANCIS E. MCGOVERN,
Counsel for Petitioner.

STEPHEN J. MCMAHON,
Of Counsel.

Office - Supreme Court, U. S.
FILED
DEC 5 1941
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 682

DANIEL W. HOAN,

Petitioner,

vs.

THE JOURNAL COMPANY, HARRY J. GRANT AND LAWRENCE C. EKLUND,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN, U. S. A.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN AND BRIEF IN SUPPORT THEREOF.

FRANCIS E. MCGOVERN,
Counsel for Petitioner,
606 W. Wisconsin Ave.,
Milwaukee, Wisconsin.

STEPHEN J. MCMAHON,
Of Counsel.

SUBJECT INDEX TO PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

A. Petition.

	Page
I. Explanation of lack of sufficient time for reply brief	2
II. Importance of issues involved	3
III. Statement of essential facts	3-7
Prayer for relief	8
Verification of petitioner	8

B. Brief.

Preliminary statements	9
I. Importance of right of trial by jury in actions at law	10-11
II. Petitioner deprived of his property without due process of law	11-19
III. Denial of petitioner's right to jury trial in violation of compact of Ordinance of 1787	19-21
IV. Conflict between Wisconsin Supreme Court and other courts of last resort on "due process of law" and right thereunder to jury trial	21
V. Last Clause of Amendment VII to the United States Constitution applicable to trials of cases in State courts	22-23
VI. Wisconsin proceeded erroneously as in equity in trial of case at bar	24
VII. Verdict of jury in action at law stands if any credible evidence to sustain it	25-26
VIII. Petitioner has not had trial by jury in case at bar	26-28
Conclusion	28
Certificate of counsel	28

List of Cases

Bank of Hamilton v. *Dudley's Lessee*, 27 U. S. (2 Pet.) 492 ..... 13, 18, 20, 21
Berry v. *U. S.*, 312 U. S. 450 ..... 23, 25
Borg v. *Downing*, 221 Wis. 463 25
Capital Traction Co. v. *Hof*, 174 U. S. 1 ..... 10, 22, 25

Page

Chicago, Burlington &c. R'd v. *Chicago*, 166 U. S. 226 10, 22, 25, 26
Colon v. *Lisk*, 47 N. E. (N. Y.) 302 13
Conway v. *O'Brien*, 312 U. S. 492 23, 25
Dale v. *Marvin*, 148 Pac. (Ore.) 1116 14
Evans v. *Lehigh Coal & Navigation Co.*, 205 Fed. 637 18
Edwards v. *Elliott*, 88 U. S. (Wall.) 532 9
Gumm v. *Koefle*, 227 Wis. 635 25
Guthrie Nat. Bank v. *McElhiney*, 47 Pac. (Okl.) 1062 14
Halliger v. *Davis*, 146 U. S. 314 13, 14
Hawkins v. *Bleakly, Auditor of the State of Iowa*, 243 U. S. 210 20
Hewitt v. Duncan's Estate, 43 S. W. (2d) 87 (Mo.) 18
Hoan v. *Journal Co.* 238 Wis. 311; 208 N. W. 228 21
Hodges v. *Easton*, 106 U. S. (XVI Otto) 408 10
Jensen v. *Jensen*, 228 Wis. 77 25
Justices v. *Murray*, 76 U. S. 274 22, 25
Kennard v. *Louisiana ex rel. Morgan*, 92 U. S. 480 13, 14
Meeker & Co. v. *Lehigh Valley R. R.*, 236 U. S. 416 13
Millard v. *N. River Ins. Co.*, 201 Wis 25
Milwaukee v. *State*, 193 Wis. 423 20
Plimpton v. *Town of Somerset*, 33 Vt. (Shaw) 283 11, 13, 18, 21, 27
Porter v. *Mitchell*, 4 Alaska 327 13, 14
Reed v. *Wright*, 2 Iowa (Greene's Rep's) 15 14, 20, 21
Rieschl v. *Wis. Mich. Power Co.*, 236 Wis. 116 25
Slocum v. *New York Life Ins. Co.*, 228 U. S. 364 18, 22, 25
Southern Ry. Co. v. *Eichler*, 56 F. (2d) 1010 13
The Sarah, Hazard, Claimant, 21 U. S. (8 Wheat.) 391 18, 25
Turner Creamery Co. v. *Chicago, M., St. P. Ry. Co.*, 154 N. W. (S. D.) 819 14
Turnpike Company v. *Parks, et al.*, 50 Ohio St. Rep., 568 11, 12, 13, 15, 18, 20, 21
Trantmam v. *Chas. Schefft & Sons Co.*, 201 Wis. 113 25
Treat Manufacturing Co. v. *Standard Steel & Iron Co.*, 157 U. S. 674 23
Walker v. *Sauvinet*, 92 U. S. 90 13, 14, 28
Walter v. *Four Wheel Drive Auto. Co.*, 213 Wis. 559 25
Welb, Auditor & Co. v. *Baird*, 6 Ind. 13 13, 18, 20
Webster v. *Reid*, 52 U. S. (11 How.) 437 13, 20
Whitehead v. *Shattluck*, 138 U. S. 146 18, 24

CONSTITUTIONAL PROVISIONS.

A. Federal.

	Page
Section 1, Article XIV, of Amendments	13, 19
Amendment VII	22

B. Wisconsin.

Section 3, Article I	16
Section 5, Article I	17
Section 9, Article I	17
Section 22, Article I	17
Section 13, Article XIV	17

FEDERAL STATUTES

Ordinance of 1787, Wisconsin Annotations (1914), 1790	19
9 U. S. Statutes at Large 178	19

Wisconsin Statutes.

Wisconsin Statutes (1939), 29	11
Wisconsin Statutes (1939), 34-35, 37, 59	17
Wisconsin Statutes (1939), Section 270.07, p. 2589	17
Wisconsin Statutes (1939), Section 270.32, p. 2596	18

TEXT BOOKS.

Odgers on Libel and Slander (6th Ed.), 3	12
Wisconsin Annotations (1914), 1767	10
Wisconsin Annotations (1914), 1757, 1788-1791, 1799, 1807-1810	18
Wisconsin Annotations (1914), 1790	19

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 682

DANIEL W. HOAN,

Petitioner,

vs.

THE JOURNAL COMPANY, HARRY J. GRANT AND LAWRENCE C. EKLUND,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN, U. S. A.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN AND BRIEF IN SUPPORT THEREOF.

To the Honorable, Harlan F. Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully petitions and prays this Court to reconsider its determination, or order, made on November 10, 1941, which denied his petition for a writ of

certiorari to the Supreme Court of the State of Wisconsin to review the judgment, decision, proceedings and determination of that Court in an action at law to which your petitioner and the above-named respondents are parties, and more particularly the judgment made and entered therein May 20, 1941, upon which a rehearing thereon was denied July 7, 1941.

Your petitioner respectfully shows:

I.

Respondents' brief opposing grant of writ was filed with this Court on or about October 23, 1941. Petitioner's reply brief was filed with this Court on November 7, 1941. Between those dates, petitioner was away from the City of Washington, D. C., and from his home at Milwaukee, Wisconsin, nearly all of the time on official duty for the United States Government, and more particularly for the Office of Civilian Defense, with which he has been officially connected for considerable time. Between those dates petitioner made several extensive trips to various parts of the United States on such official duty. Petitioner has been devoting himself almost exclusively to official duty for the United States Government in connection with the National Defense for approximately fifteen months past, continuously.

In that time petitioner has traveled nearly 90,000 miles, at least. Between October 23, 1941, and November 7, 1941, it was impossible, because of official duties, for petitioner to give proper attention to the preparation of Petitioner's Reply Brief, in conjunction with his Counsel, with whom he was unable to have sufficient contact and communication; and, because thereof, it was not decided until the evening of November 4, 1941, to authorize the filing of a reply brief. As a result of the enforced lateness of such authorization, only a little more than two days was allowed for the preparation of such reply brief; and less than one day was al-

lowed for the printing thereof, it being the desire of petitioner and his Counsel to file the same with this Court as timely as possible. Because of the foregoing, petitioner's reply brief did not fully or adequately present the facts and law or stress important phases thereof, and more particularly important phases of the law. Petitioner and his Counsel feel that in their reply brief which was filed their full duty to this Court has not been discharged.

Petitioner has been a member of the Bar of this Court since February 29, 1912 and has kept, and desires to keep, in close touch with the case at bar and with his Counsel in the case; he has advised and consulted with his counsel to the fullest extent practicable; and his Counsel has indicated a desire that he do so.

II.

The case at bar involves rights of *transcendant* importance, more particularly the rights of petitioner, and others similarly situated, pertaining to "trial by jury" in actions at law under the guarantee of "due process of law" under the provisions of Section 1, Article XIV, of the Amendments to the Federal Constitution. Petitioner's personal rights in this respect are involved in the case at bar. If this Court grants a petition for certiorari in the case at bar, any precedent established herein will, in petitioner's opinion, be of great value and importance.

III.

On or about October 27, 1937, petitioner commenced an action at law against the above-named respondents herein to recover damages for defamation by libel. Issue was joined and a jury was drawn to hear the evidence and render a verdict (R. 498-499). After hearing all of the evidence, the argument of Counsel, on both sides, and the instructions of the Judge of the Circuit Court of Milwaukee

County, Wisconsin, wherein the case was tried, the jury rendered a special verdict as follows:

"Question 1: Would a person of average intelligence and comprehension, upon reading the entire article in question printed in the Milwaukee Journals of November 3rd, and 4th, 1935, naturally have understood that it was thereby stated and charged that the plaintiff was guilty as a principal of the crime of malicious destruction of property? Answer: Yes.

"Question 2: If you answer Question 1 'no,' then answer this question: Would a person of average intelligence and comprehension, upon reading the entire article in question printed in the Milwaukee Journals of November 3rd and 4th, 1935, naturally have understood that it was thereby stated and charged that the plaintiff was guilty as accessory before the fact of the crime of malicious destruction of property? Answer: Yes.

"Question 3: If you answer Questions 1 and 2 'no,' then answer this question: Would a person of average intelligence and comprehension, upon reading the entire article in question published in the Milwaukee Journals of November 3rd and 4th, 1935, naturally have understood the statement concerning the plaintiff to charge him with neglect in the performance of his duty as mayor of the city to preserve the public peace and good order of the City, as to charge him with moral responsibility for the bombings? Answer: Yes.

"Question 4: If you answer Question 3 'yes,' then answer this question: Did such statement tend or calculate to bring the plaintiff into shame, humiliation or disgrace? Answer: Yes.

"Question 5: If you answer Question 3 'yes,' then answer this question: Was such statement in the light of the article as a whole a fair comment on the acts and conduct of the plaintiff in the performance of his duties as mayor of the city of Milwaukee? Answer: No.

"Question 6: In writing the article in question published in the Milwaukee Journals of November 3rd and

4th, 1935, was the defendant, Lawrence C. Eklund, actuated by malice? Answer: Yes.

"Question 7: In publishing the article in question on November 3, 1935, was the defendant, the Journal Company, actuated by malice? Answer: Yes.

"Question 8: In publishing the article in question on November 4, 1935, was the defendant, the Journal Company, actuated by malice? Answer: Yes.

"Question 9: In publishing the article in question on November 3, 1935, was the defendant, Harry J. Grant, actuated by malice? Answer: Yes.

"Question 10: In publishing the article in question on November 4, 1935, was the defendant, Harry J. Grant, actuated by malice? Answer: Yes.

"Question 11: If the Court should be of the opinion that plaintiff is entitled to recover, at what sum do you assess his compensatory damages? Answer: $10,000.00.

"Question 12: If you answer any of Questions 7, 8, 9, 10 and 11 'yes', and decide to assess punitory damages, then answer this question: What sum do you assess as and for punitory damages? Answer: $10,000.00.

Dated June 28, 1940" (R. 506-507).

The Wisconsin Courts changed the answers to Questions 1 and 2 from "yes" to "no" and held that the answers to questions 3-10 were insufficient to support a judgment for petitioner (R. 499, 509).

The defamatory words complained of were a very small portion of an article published by the Respondents' newspaper and are as follows:

> "The mayor of Sheboygan Falls has slight regard for his fellow mayor, Daniel Webster Hoan of Milwaukee, which was shunned by Kinite in its return to the state.
>
> "'Mayor Hoan travels around the country telling how well Milwaukee is governed,' said the mayor of Sheboygan Falls. 'Meanwhile terrorists bomb Milwaukee's police station and banks. Mayor Hoan himself is to blame for those bombings.'" (Transcript of Record 508.)

This is the only language to which the first two questions pertained, and these questions were peculiarly appropriate to be answered by a jury of laymen. They called for answers that could be best given by jurors composed of laymen.

We quote from the decision of the Supreme Court of Wisconsin in the case at bar as follows:

> "The only reference to the plaintiff or his administration of his office was that contained in the quoted paragraph." (Transcript of Record 510.)

We quote further from the decision of the Supreme Court of Wisconsin in the case at bar as follows:

> "To make its position as well as the position of this Court somewhat clearer some facts should be stated *in addition to those appearing in the pleadings.*" (Transcript of Record 509. Italics ours.)

It is not proper for a Court to base findings of fact upon pleadings. They must be derived from the evidence.

We quote further from the decision of the Supreme Court of Wisconsin in the case at bar as follows:

> "The court determines whether a communication is capable of a defamatory meaning while it is the function of the jury to determine whether a communication capable of a defamatory meaning was so understood by its recipient. (Sec. 614, Restatement of Defamation.)" (Transcript of Record 514.)

We raise no question about the correctness of this statement of the law, but the Wisconsin courts invaded, erroneously, *"the function of the jury"* as stated above when they changed the answers of the jury to the first two questions of the special verdict.

We raise no question about the correctness of the Restatement of the Law of Torts at page 513 of the Transcript of the Record as set forth by the Wisconsin Supreme

Court, which deals with the subject of "Criticism"; but the above quoted defamatory language is not "Criticism", privileged or otherwise. It is an untrue defamatory statement, which is not in the form of "Criticism". It is an untrue statement, defamatory, ascribed to another in narrative form.

We quote further from the decision of the Supreme Court of Wisconsin in the case at bar as follows:

> "The plaintiff also contends that he has been deprived of the right of jury trial by the determination of the trial court. It is considered that this contention is without merit." (Transcript of Record 514.)

We quote finally from the decision of the Supreme Court of Wisconsin in the case at bar as follows:

> "On Motion for Rehearing
>
> Per Curiam:
>
> On motion for rehearing. In support of his motion for rehearing, plaintiff contends that in the trial of the action he was denied due process of law and the equal protection of law under the Fourteenth amendment to the Constitution of the United States. We have carefully examined this contention and find no basis for its support in the record." (Transcript of Record 517-518.)

We believe that Petitioner will suffer a denial of due process of law, as guaranteed by Section 1, Article XIV, of the Amendments to the Federal Constitution, by a denial to him of "trial by jury" in the case at bar, in the event that this Court does not grant to him a writ of certiorari as prayed for in his original Petition therefor, and the other relief therein prayed for.

We respectfully submit a brief with this petition in support hereof, wherein further grounds therefor are more fully set forth.

Wherefore, we pray that this Petition for a Rehearing be granted, and for the relief sought in the prayer of such original Petition of this Petitioner, filed and docketed in this Court on October 4, 1941.

Respectfully submitted,

DANIEL W. HOAN,
Petitioner,

STEPHEN J. McMAHON,
Of Counsel.

FRANCIS E. McGOVERN,
Counsel for Petitioner.

CITY OF WASHINGTON,
District of Columbia, ss:

Daniel W. Hoan, being first duly sworn, on oath says that he is the petitioner named in and who signed the foregoing petition; that he has read said petition and knows the contents thereof and that the same is true to his own knowledge, except as to the matters therein obviously alleged on information and belief, and as to those matters he believes it to be true.

DANIEL W. HOAN,
Petitioner.

Subscribed and sworn to before me this 5th day of December, 1941.

VERNON B. STICKLEY,
Notary Public.

(Notorial Seal)

My commission expires August 15, 1946.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 682

DANIEL W. HOAN,

Petitioner,

vs.

THE JOURNAL COMPANY, HARRY J. GRANT AND LAWRENCE C. EKLUND,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN, U. S. A.

PETITIONER'S BRIEF IN SUPPORT OF HIS PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT O FTHE STATE OF WISCONSIN.

Preliminary Statements.

In this brief we confine ourselves to the issues of "due process of law" and the right of "trial by jury."

This Court places a liberal construction on its requirements for a review of records and decisions of state courts.

Edwards v. *Elliott*, 88 U. S. (21 Wall.) 532;
Chicago, Burlington &c. R'd v. *Chicago*, 166 U. S. 226.

POINT I.

The right of trial by jury in actions at law, such as the case at bar, is a right of paramount importance and value.

We quote from *Hodges* v. *Easton*, 106 U. S. (XVI Otto), at 408, at p. 412, as follows:

> "It has been often said by this court that the trial by jury is a fundamental guarantee of the rights and liberties of the people. Consequently, every reasonable presumption should be indulged against its waiver."

We quote from *Capital Traction Company* v. *Hof*, 174 U. S. 1, at p. 6, as follows:

> "II. The first Continental Congress, in the Declaration of Rights adopted October 14, 1774, unanimously resolved that 'the respective Colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law.' 1 Journals of Congress, 28.
>
> "The Ordinance of 1787 declared that the inhabitants of the Northwest Territory should 'always be entitled to the benefits of the writ of *habeas corpus*, and of the trial by jury,' 'and of judicial proceedings according to the course of the common law.' 1 Charters and Constitutions, 431."

One of the causes for the Declaration of Independence was denial of the right of "Trial by Jury". *Wisconsin Annotations* (1914), p. 1767.

We quote from *Chicago, Burlington &c. R'd* v. *Chicago*, 166 U. S. 226, at p. 243, as follows:

> "One of the objections made to the acceptance of the Constitution as it came from the hands of the Convention of 1787 was that it did not, in express words, preserve the right of trial by jury, and that under it, facts tried by a jury could be re-examined by the courts of the United States otherwise than according to the rules of the common law."

We quote from *Plimpton* v. *Town of Somerset,* 33 Vermont (4 Shaw) 283, at p. 290, as follows:

> "The language of our first constitution, and which has ever since been retained, that trial by jury '*ought to be held sacred,*' shows vividly the strong attachment of the people of this State to this mode of trial, and their implicit belief that it is essential to the honest and enlightened administration of justice. At the time of the adoption of the Federal and State constitutions, this feeling was a very strong one with the American people."

We quote from *Turnpike Company* v. *Parks et al.,* 50 Ohio State Reports 568, at p. 578, as follows:

> "The section in the present constitution preserving inviolate the right of trial by jury, is found in the constitution of 1802, and in the same words. It is a guarantee of the continuance of a right recognized in the Great Charter, and substantially embodied in the constitutional *compact* of every state, as the great safeguard of life, liberty and property." (Italics supplied.)

The Ohio Supreme Court here probably had in mind the *compact* of the Ordinance of 1787 for the Government of the Northwest Territory out of which Ohio, like Wisconsin, was carved.

Point II.

Petitioner has been deprived of his property without due process of law by a denial to him, by Wisconsin Courts, of a trial by jury in the libel case at bar in violation of Section 1 of Article XIV of the Amendments to the Federal Constitution.

We quote from this Section 1 as follows:

> "* * *; nor shall any State deprive any person of life, liberty, or property, without due process of; * * *." Wisconsin Statutes, 1939, p. 29.

The *reputation* of the petitioner of which he was deprived by a denial of due process of law by a denial of trial by jury as pointed out herein *is property.*

We quote from *Odgers on Libel and Slander* (sixth edition) by W. Blake Odgers and R. Ritson, as follows:

> "If in any given case the words employed by the defendant have appreciably injured the plaintiff's reputation, the plaintiff has suffered an injury which is actionable without proof of any other damage. Just as any invasion of a man's property is actionable without proof of any pecuniary loss, so is any actual disparagement of his good name. '*His reputation is his property,* and, if possible, more valuable than other property' (*per* Malins, V-C., in *Dixon* v. *Holden* (1869), L. R. 7 Eq., at p. 492). 'Indeed, if we reflect on the degree of suffering occasioned by loss of character, and compare it with that occasioned by loss of property, the amount of the former injury far exceeds that of the latter' (*per* Best, C. J., in *De Crespigny* v. *Wellesley* (1829), 5 Bing., at p. 406). Often, too, a man's livelihood depends on his reputation. Whenever, therefore, the words are such that they will necessarily injure the reputation of the plaintiff, they are defamatory on the face of them, and actionable *per se.*" (Italics not in parentheses are ours.)

We quote from *Turnpike Company* v. *Parks et al.,* 50 Ohio State Reports 568, at p. 576, as follows:

> "The term property, as said in *Caro* v. *Metropolitan Elevated Railroad Co.,* Superior Court of N. Y., Gen'l. Term, January, 1880, 19 Am. L. Reg. N. S., 384, is of the largest import, and embraces every mode in which it may be applied to public use, and extends to every species of valuable right and interest, and includes real and personal property, easements, franchises and incorporeal hereditaments. It is an elementary principle that 'property consists in the free use, enjoyment and disposal of all one's acquisitions without any control or diminution, save by the laws of the land.' 1 Black. Comm., 138."

See *Walker* v. *Sauvinet*, 92 U. S. 90, wherein a claim, and a judgment, for $1,000 against the proprietor of a public coffee-house for a discrimination against a colored person by excluding him from such public coffee-house in violation of a statute, was treated as *property*.

It is well settled that the right of trial by jury in actions at law, and other cases, in State courts, is in the realm or sphere of "due process of law" as guaranteed by Section 1, Article XIV, of the Amendments to the Federal Constitution and is referable to such guarantee; and that, if a State provides for the right of trial by jury in actions at law, or other cases, as a part of its "settled course of judicial proceedings", and adheres to such right of trial by jury as a part of such "proceedings", in its organic law, Constitution, statutes, or otherwise, a denial of such right of trial by jury in actions at law, or other cases, in such State is a denial of "due process of law" as guaranteed by this Section 1, Article XIV. An extensive search therefor has failed to discover any adequate authority or precedents for a contrary view. There is a wealth of authority or precedents, expressly or by implications, in support of this view.

Bank of Hamilton v. *Dudley's lessee*, 27 U. S. (2 Pet.) 492;
Webster v. *Reid*, 52 U. S. (11 How.) 437;
Walker v. *Sauvinet*, 92 U. S. 90;
Kennard v. *Louisiana ex rel. Morgan*, 92 U. S. 480;
Hallinger v. *Davis*, 146 U. S. 314;
Meeker & Co. v. *Lehigh Valley R. R.*, 236 U. S. 412, 430;
Southern Ry. Co. v. *Eichler*, 56 F. (2d) 1010, 1013;
Porter v. *Mitchell*, 4 Alaska 327, 332;
Turnpike Co. v. *Parks et al.*, 50 Ohio State Reports, 568, 578;
Webb, Auditor, & Co. v. *Baird*, 6 Ind. 13;
Plimpton v. *Town of Somerset*, 33 Vermont 283, 288;
Colon v. *Lisk*, 47 N. E. (N. Y.) 302, 303;

Guthrie Nat. Bank v. *McElhiney*, 47 Pacific (Okl.) 1062, 1063;

Turner Creamery Co. v. *Chicago, M., St. P. Ry Co.*, 154 N. W. (S. D.) 819, 824-825;

Reed v. *Wright*, 2 Iowa (Greene's Rep's) 15;

Dale v. *Marvin*, 148 Pac. (Ore.) 1116, 1118.

We quote from the *Walker* case, at pp. 92-93, as follows:

> "A State cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the State courts affecting the property of persons must be by jury. *This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings. Murray's Lessee* v. *Hoboken L. & I. Co.*, 18 How. 280. *Due process of law is process due according to the law of the land. This process in the States is regulated by the law of the State.* Our power over that law is only to determine whether it is in conflict with the supreme law of the land,—that is to say, with the Constitution and laws of the United States made in pursuance thereof,—or with any treaty made under the authority of the United States." (Italics are ours in the citation of authority.)

This *Walker* case is cited, reviewed, approved and quoted from, for the most part as herein quoted from, in *Hallinger* v. *Davis*, 146 U. S. 314, 320.

We quote from the *Kennard* case, at p. 481, as follows:

> "The sole question presented for our consideration in this case, as stated by the counsel for the plaintiff in error, is, whether the State of Louisiana, acting under the statute of Jan. 15, 1873, through her judiciary, has deprived Kennard of his office without due process of law. It is substantially admitted by counsel in the argument that such is not the case, if it has been done '*in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights.*' We accept this as a suf-

cient definition of the term '*due process of law*,' for the purposes of the present case." (Italics ours.)

We quote from the *Porter* case, at p. 332, as follows:

"'*Due process of law*' *carries with it the right of trial by jury, when trial by jury has been the usual course of administration in the particular class of actions, through courts of justice, to which the one in question belongs.* What was at the time of the adoption of the Constitution of the United States the usual course of administration of courts of justice was grafted into that Constitution under the name of '*process of law, or trial,*' *and carries with it the right of trial by jury in all cases in which trial by jury was a part of the usual course of administration through the courts of justice at the time the Constitution was adopted.*" (Italics ours.)

We quote from the *Turnpike Company* case, at p. 579, as follows:

"The determination of the issues in the probate court being properly within the domain of a jury; and as the result of the court's finding the road to have been out of repair for the preceding six months was, that the franchise of the company to take toll was adjudged under the statute to have been extinguished, it may well be asked, whether the company was not, in contravention of the constitution of the State and of the United States, thereby deprived of its property '*without due course of law,*' *or its equivalent,* '*due process of law,*' *when denied the privilege of a jury trial.*" (Italics ours.)

* * * "It would be very difficult to frame a definition of the term '*due course of law,*' *or* '*due process of law,*' which would be accurate, complete and appropriate under all circumstances. But it is very obvious that every thing which takes the form of an enactment is not therefore to be deemed the law of the land, or due course or process of law. If this were so, then decrees and forfeitures in all possible forms, and acts confiscating the

property of one person or class of persons, or a particular description of property, upon some view of public policy, where it could not be said to be taken for a public use, would be the law of the land."

From the foregoing cases and quotations from some of them it is well settled that "due course of law" means "due process of law"; that "due process of law" means "process of law, or trial," and "in the due course of legal proceedings" or "according to the settled course of judicial proceedings"; that due process of law is process according to "the law of the land"; that "This process in the States is regulated by the law of the State"; that "the law of the State" means "the law of the land" in the State; that the words "due process of law", as thus defined, comprehend or embrace trials of cases as a part of such "proceedings", including trials by juries; and that the requirement of "due process of law" of this Section 1, Article XIV, *"is met if the trial is had according to the settled course of judicial proceedings" of "the State"*. This requirement cannot be met in any other way.

It is likewise well settled that "the settled course of judicial proceedings", "due process of law," in Wisconsin requires that the petitioner in the case at bar, an action at law, should not be denied a "trial by jury".

The *Wisconsin Constitution* provides as follows:

"ARTICLE I.

Declaration of Rights.

* * * * * * *

Free speech; libel. Section 3. Every person may freely speak, write and publish his sentiments on all subjects, *being responsible for the abuse of that right*, and no laws shall be passed to restrain or abridge the liberty of speech or of the press. * * *

* * * * * * *

Trial by jury; verdict in civil cases. Section 5. *The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy;* but a jury trial may be waived by the parties in all cases in the manner prescribed by law. * * *

* * * * * * *

Remedy for wrongs. Section 9. Every person is entitled to a certain remedy in the laws *for all injuries,* or *wrongs which he may receive in his person, property, or character; he ought to obtain justice* * * * *completely and without denial,* * * * *conformably to the laws.*

* * * * * * *

Maintenance of free government. Section 22. The blessings of a free government can only be maintained by a firm adherence to justice, * * *, *and by frequent recurrence to fundamental principles.*

* * * * * * *

ARTICLE XIV.

* * * * * * *

Common law continued in force. Section 13. Such parts of the *common law* as are now in force in the territory of Wisconsin, not inconsistent with this constitution, shall be and continue part of the law of this state until altered or suspended by the legislature." (Italics ours.)

Wisconsin Statutes, 1919, pp. 34, 35, 37, 59.

We quote from the *Wisconsin Statutes*, 1939, as follows:

"270.07. Issues, by whom tried, when tried. (1) An issue of fact in an action for the recovery of *money only,* * * * *must be tried by a jury* except as otherwise provided in this chapter and except that equitable defenses or counter-claims are triable by the court. * * *

270.32. Jury trial, how waived. Trial by jury may be waived by the several parties to an issue of fact by failing to appear at the trial, or by written consent filed with the clerk; or by consent in open court, entered in the minutes." (Italics ours.)

Wisconsin Statutes, 1939, pp. 2589, 2596.

At *common law*, all issues of fact, in actions at law, were required to be tried before and decided by a jury.

The Sarah Hazard, Claimant, 21 U. S. (8 Wheat.) 391;

The Bank of Hamilton v. *Dudley's lessee*, 27 U. S. (2 Pet.) 492;

Whitehead v. *Shatluck*, 138 U. S. 146;

Slocum v. *New York Life Ins. Co.*, 228 U. S. 364, 377;

Evans v. *Lehigh Coal & Navigation Co.*, 205 Fed. 637, 638;

Webb, Auditor & C. v. *Baird*, 6 Indiana 13;

Turnpike Company v. *Parks et al.*, 50 Ohio State Reports 568, 578;

Plimpton v. *Town of Somerset*, 33 Vermont 283, 291;

Hewitt v. *Duncan's Estate*, 43 S. W. (2d) 87, 89 (Mo.).

The right of trial by jury was recognized and granted in Magna Charta June 15, 1215. It was incorporated in the *compact* contained in The Ordinance of 1787 entered into on July 13, 1787, for the government of the Northwest Territory, out of which the State of Wisconsin was subsequently carved. The right of trial by jury was made secure to the people of the Territory of Michigan, of which Wisconsin was at one time a part; and it was likewise made secure to the people of the Territory of Wisconsin when it was created out of the Territory of Michigan. *Wisconsin Annotations* (1914) pp. 1757, 1788-1791; 1799, 1807-1810.

In view of all of this, and taking into consideration the definitions of "due process of law" set forth above and

the provisions of the *Wisconsin Constitution and Statutes* set forth herein, "trial by jury" in actions at law, such as the case at bar, is guaranteed to the petitioner under the guarantee of "due process of law" contained in Section 1, Article XIV, of the Amendments to the Federal Constitution.

POINT III.

The denial of the right of trial by jury to petitioner by the Wisconsin courts, in the case at bar, is in violation of the "COMPACT" of July 13, 1787, contained in the ordinance for the Government of the Territory of the United States Northwest of the Ohio River (Ordinance of 1787), out of which Wisconsin and four other States were carved.

We quote from this *Ordinance* as follows:

> "It is hereby ordained and declared, by the authority aforesaid, that the following articles shall be considered as articles of *compact* between *the original states*, and *the people and states in the said territory*, and *forever remain unalterable*, unless by *common consent*, to wit:
>
> * * * * * * *
>
> "Art. 2d. The inhabitants of the said territory, shall *always* be entitled to the benefits of * * * *the trial by jury*, * * *." (Italics ours.) *Wisconsin Annotations* (1914) at p. 1790.

We are aware that the State of Wisconsin was "admitted into the Union on an equal footing with the original States, in all respects whatever". 9 *United States Statutes at Large* 178. There is, however, nothing in this language of the statutes just quoted which contains the consent of the people of Wisconsin, Territory or State, to a change in the *compact* of the Ordinance of 1787 giving them the right of "trial by jury" *forever* without such consent. A search has failed to disclose that the people of Wiscon-

sin ever gave their consent to such change in the *compact*. On the contrary the Wisconsin Constitution and Statutes, heretofore set forth, establish that they never did give their consent to such change. We have not overlooked *Hawkins* v. *Bleakly, Auditor of the State of Iowa, et al.*, 243 U. S. 210, where there is dicta to the contrary on the above "equal footing" language. This like other workmens' compensation statutes, is distinguishable from the case at bar.

The term *compact* is a very binding term and it cannot be treated lightly. A *compact* is fully as binding, if not more so, as a contract or a covenant.

We are not here concerned with the right of Wisconsin to impair or otherwise violate the terms of this *compact*, or contract, or covenant, because Wisconsin has never attempted to do so. On the other hand Wisconsin has adhered to the *compact* rigidly.

The legislative branch of a Government of a Territory governed by the Ordinance of 1787 lacked power to prohibit *"trial by jury"* of matters of fact in actions at law.

Webster v. *Reid*, 52 U. S. (11 How.) 437;

Reed v. *Wright*, 2 Iowa (Greene's Rep's) 15.

After the admission of a State into the Union from the Northwest Territory, the Supreme Court or other courts of such State could not deny to a litigant before it the right of "trial by jury" in an action at law.

The Bank of Hamilton v. *Dudley's Lessee*, 27 U. S. (2 Pet.) 492;

Webster v. *Reid*, 52 U. S. (11 How.) 437;

Turnpike Company v. *Parks, et al.*, 50 Ohio State Reports 568, 578;

See Milwaukee v. *State*, 193 Wis. 423, 440.

Petitioner stands upon his rights, under this *compact* of the Ordinance of 1787, in the case at bar.

Point IV.

There is a conflict between the decision of the Wisconsin Supreme Court in the case at bar and decisions of this Court and of other State courts of last resort, including some from States governed by the Ordinance of 1787 and carved out of the Northwest Territory.

There is a conflict between the decisions of the Supreme Court of Wisconsin and the Circuit Court of Milwaukee County in the case at bar (*Hoan* v. *Journal Co.*, 238 Wis. 311; 208 N. W. 228), on the one side, in so far as they have held or decided that a denial of a "trial by jury" is not a denial of "due process of law," and decisions of this Court and of other State courts of last resort, including some carved out of the Northwest Territory on the other side, which hold to the contrary. These contrary decisions of such other State courts of last resort are as follows:

Bank of Hamilton v. *Dudley's Lessee*, 27 U. S. (2 Pet.) 492;
Webb, Auditor & C. v. *Baird*, 6 Ind. 13;
Reed v. *Wright*, 2 Iowa (Greene's Rept's) 15;
Turnpike Company v. *Parks et al.*, 50 Ohio State Reports, 568, 578;
Plimpton v. *Town of Somerset*, 33 Vermont 283, 288.

We urge that this conflict of decisions between State courts is, standing alone, an adequate ground for the granting of certiorari by this Court in the case at bar, especially in view of the fact that there is a conflict between States governed by the above set forth *Compact* of the *Ordinance of 1787*.

POINT V.

The last clause of the Seventh Amendment to the Federal Constitution applies to cases tried before a jury in a State court, equally with those tried before a jury in a Federal court, and it is applicable to the case at bar in all respects.

The Justices v. *Murray*, 76 U. S. 274;
Chicago, Burlington &c. R'd v. *Chicago*, 166 U. S. 226, 242;
Capital Traction Company v. *Hof*, 174 U. S. 1, 13;
Slocum v. *New Work Life Ins. Co.*, 228 U. S. 364, 379.

This last clause of this Seventh Amendment to the Federal Constitution is as follows:

> "* * * and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

We quote from this *Chicago* case, commencing at p. 242, as follows:

> "It is clear that the last clause of the Seventh Amendment is not restricted in its application to suits at common law tried before juries in the courts of the United States. *It applies equally to a case tried before a jury in a State court* and brought here by writ of error from the highest court of the State." (Italics ours.)

We quote from this *Slocum* case, at p. 379, as follows:

> "In *Capital Traction Co.* v. *Hof*, 174 U. S. 1, 13, decided in 1899, the subject was much considered, and, following a careful review of the prior decisions, it was said by Mr. Justice Gray, who spoke for the court: 'It must therefore be taken as established, by virtue of the Seventh Amendment of the Constitution, that either

party to an action at law (as distinguished from suits in equity or in admiralty) in a court of the United States, where the value in controversy exceeds twenty dollars, has the right to a trial by jury; that, *when a trial by jury has been had in an action at law, in a court either of the United States or of a State, the facts there tried and decided cannot be re-examined in any court of the United States, otherwise than according to the rules of the common law of England; that by the rules of that law, no other mode of re-examination is allowed than upon a new trial, either granted by the court in which the first trial was had or to which the record was returnable, or ordered by an appellate court for error in law; and therefore that, unless a new trial has been granted in one of those two ways, facts once tried by a jury cannot be tried anew, by a jury or otherwise, in any court of the United States.*' " (Italics ours.)

The limitations upon and the method of re-examining the facts tried by the jury in the case at bar according to the rules of the common law, as provided for in the last clause of this Seventh Amendment, are fully pointed out in the above language of the *Slocum* case set forth in *italics;* and there is no other method thus provided.

The nullification of the jury's verdict in the case at bar should not be permitted to stand in view of the provisions of the last clause of this Seventh Amendment.

To the extent, if any, that *Treat Manufacturing Company* v. *Standard Steel and Iron Company,* 157 U. S. 674, which appears on p. 20 of Respondent's brief, holds that a trial judge in a Federal court may arbitrarily dispense with the verdict of a jury by directing a verdict, or otherwise, the precedent established by that case has been, in effect, impaired, if not nullified, by the later decisions of this Court cited above to Point III and by *Berry* v. *United States,* 312 U. S. 450 and *Conway* v. *O'Brien,* 312 U. S. 492.

Point VI.

The courts of Wisconsin proceeded erroneously in the case at bar PRECISELY as if this case were not an action at law but a suit in a court of equity where "a jury can only be summoned at its discretion, to ascertain special facts for its enlightenment".

See *Whitehead* v. *Shatluck*, 138 U. S. 146, from which we quote, at p. 151, as follows:

> "The Seventh Amendment of the Constitution of the United States declares that 'in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' That provision would be defeated if an action at law could be tried by a court of equity, as in the latter court a jury can only be summoned at its discretion, to ascertain special facts for its enlightenment. *Lewis* v. *Cocks*, 23 Wall. 466, 470; *Killian* v. *Ebbinghaus*, 110 U. S. 568, 573; *Buzard* v. *Houston*, 119 U. S. 347, 351. And so it has been held by this court 'that whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury.' *Hipp* v. *Babin*, 19 How. 271, 278."

The Wisconsin courts thus proceeded contrary to the applicable provisions of the Wisconsin Constitution and Statutes, herein elsewhere set forth, securing to the petitioner the right of *"trial by jury"* according to *"the law of the land"* which means *"the law of the State"*, which means *"trial"* *"according to the settled course of judicial proceedings"* of *"the State"*, which means *"due process of law"* or its equivalent *"due course of law"*, as herein elsewhere more fully pointed out.

Point VII.

If there is any credible evidence to sustain a finding of fact made by a jury, in an action at law, the verdict of the jury must be permitted to stand.

This is the law of the United States and of the State of Wisconsin.

The Sarah Hazard, Claimant, 21 U. S. (8 Wheat.) 391;
Chicago, Burlington &c. R'd v. *Chicago,* 166 U. S. 226, 242;
The Justices v. *Murray,* 76 U. S. 274;
Capital Traction Company v. *Hof,* 174 U. S. 1, 13;
Slocum v. *New York Life Ins. Co.,* 228 U. S. 364, 379;
Berry v. *United States,* 312 U. S. 450;
Conway v. *O'Brien,* 312 U. S. 492;
Millard v. *North River Ins. Co.,* 201 Wis. 69, 71;
Trantmam v. *Charles Schefft & Sons Co.,* 201 Wis. 113, 115, 116;
Walter v. *Four Wheel Drive Auto Co.,* 213 Wis. 559, 562, 563;
Borg v. *Downing,* 221 Wis. 463, 465;
Gumm v. *Koefle,* 227 Wis. 635, 637;
Jensen v. *Jensen,* 228 Wis. 77, 80;
Rieschl v. *Wisconsin Michigan Power Co.,* 236 Wis. 116.

We quote from the *Berry* case, at p. 456, as follows:

> "There was evidence from which a jury could reach the conclusion that petitioner was totally and permanently disabled. That was enough."

We quote from the *Gumm* case, at p. 638, as follows:

> "It has been held *over and over again* that the question for determination in such situations is whether there is any credible evidence which in any reasonable

view fairly admits of an inference that supports the jury's findings. If there is such evidence trial courts are not justified in changing the answer." (Italics ours.)

Point VIII.

Petitioner has not had a "Trial by Jury" in the case at bar.

Petitioner is in the same position today as he would be in if no jury were ever drawn to hear the evidence in the case at bar and to render its verdict. It was a waste of time for the jurors to be present at the trial. They served no useful purpose as jurors. Everything they did was nullified by the action of the Circuit Court of Milwaukee County, which was affirmed by the Supreme Court of Wisconsin. We say this with all due respect to the members of both of those courts. Two of the answers of the jury to questions in the special verdict were completely changed by the substitution of wholly opposite answers; and these Wisconsin courts have rendered a judgment against petitioner and in favor of respondents just as if no answers were ever made by the jury to the other ten questions in the special verdict. All of this was done notwithstanding that there was credible evidence in the record which, if believed by the jury, was adequate to sustain each and all of their answers to the questions in the special verdict, as elsewhere pointed out more fully herein.

We quote from *Chicago, Burlington &c. R'D* v. *Chicago*, 166 U. S. 226, commencing at page 234, as follows:

> "But a State may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, *and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law regard must be had to substance, not to form.* This court, referring

to the Fourteenth Amendment, has said: 'Can a State make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation.' *Davidson* v. *New Orleans,* 96 U. S. 97, 102." (Italics ours.)

What is said here about the legislative branch of a State government applies equally to the judicial branch.

We quote from *Plimpton* v. *Town of Somerset,* 33 Vermont 283,, at p. 290, as follows:

> "Some have been led by their experience and reflection to doubt the value of jury trials, at least in certain classes of cases, and have, therefore, inclined to construe with less strictness this provision of the constitution. We think, however, that *it should be construed in the spirit with which it was enacted,* and that any restriction of its present application should come, not through legislation and judicial construction, but from the direct, constitutional and considerate action of the people.
>
> "The general rule of construction in reference to this provision of the constitution is, that any act which destroys or materially impairs *the right of trial by jury according to the course of the common law, in cases proper for the cognizance of a jury,* is unconstitutional." (Italics ours.)

We urge that the *compact* of the Ordinance of 1787, heretofore quoted, providing for the "right of trial by jury" should be given the broad construction which is called for by its language and spirit.

We quote from Respondent's Brief Opposing Grant of Writ, at page 20, as follows:

> "The petitioner has had a trial by jury although it is clear that no right secured to him by the Fourteenth

Amendment would have been infringed if he had not had a trial by jury.

Walker v. *Sauvinet*, 92 U. S. 90."

With all due respect to the very learned counsel for respondents, this contention is not supported by the facts, the record or the law, including the law of this *Walker* case, heretofore more fully pointed out.

Conclusion.

WHEREFORE Petitioner respectfully and earnestly urges that this Court rescind its determination or order made on November 10, 1941, denying his Petition for a writ of certiorari; and this Petitioner prays that the Petition for such writ of certiorari be reconsidered and that this Court issue such writ to the Supreme Court of Wisconsin to review its proceedings and decision, in the case at bar.

Respectfully submitted,

STEPHEN J. MCMAHON,
Of Counsel.

FRANCIS E. MCGOVERN,
Counsel for Petitioner.

Certificate of Counsel.

The undersigned petitioner and counsel for the petitioner, Daniel W. Hoan, above named, in the above entitled cause, hereby certify that the above and foregoing Petition for a rehearing is made, presented and filed in good faith and not for the purpose of delay; and it is believed by such counsel to be meritorious.

DANIEL W. HOAN,
Petitioner.

STEPHEN J. MCMAHON,
Of Counsel.

FRANCIS E. MCGOVERN,
Counsel for Petitioner.

SYNOPTICAL OUTLINE

Page

I. Relief now asked on ground not claimed in original petition 2

II. Federal question not seasonably raised..... 2

III. Analysis of petitioner's argument..... 3

The petitioner claims violations of

(1) the Fourteenth Amendment;

(2) the Seventh Amendment; and

(3) the Northwest Territory Ordinance of 1787.

IV. The Fourteenth Amendment does not control the right to a trial by jury in a state court..... 4

V. The Seventh Amendment has no application to state court action 5

VI. Nothing in the Northwest Territory Ordinance of 1787 affects the right to a trial by jury in an action at law in Wisconsin..... 7

VII. Petitioner's concession that the court had the power to determine whether the article was capable of a defamatory meaning is conclusive against him 7

Once the court determined that question in favor of the defendants, no question remained for the jury.

VIII. Review of petitioner's argument..... 8

IX. A proper case for a penalty.....11

TABLE OF CASES

Page

Abbott v. Tacoma Bank of Commerce, 175 U. S. 409..... 5

Ches. & Ohio Ry. v. Carnahan, 241 U. S. 241..... 6

Chicago, Burlington, etc. R'd, 166 U. S. 226..... 6

Cincinnati v. Louisville & N. R. Co., 223 U. S. 390..... 7

Escanaba Company v. Chicago, 107 U. S. 678..... 7

Frank v. Mangum, 237 U. S. 309.....4, 5

Hawkins v. Bleakly, 243 U. S. 210.....4, 4

Iowa Central Railway Company v. Iowa, 160 U. S. 389..4, 4

Minn. & St. Louis R. R. v. Bombolis, 241 U. S. 211..... 5

New York Central R. R. Co. v. White, 243 U. S. 188....4, 4

Pearson v. Yewdall, 95 U. S. 294.....5, 6

Sands v. Manistee River Improv. Co., 123 U. S. 288.... 7

Wagner Electric Manufacturing Company v. Lyndon, et al., 262 U. S. 226.....12

Walker v. Sauvinet, 92 U. S. 90.....4, 9

Willamette Iron Bridge Co. v. Hatch, 125 U. S. 1..... 7

In the

Supreme Court of the United States

October Term, 1941

No. 682

DANIEL W. HOAN,

Petitioner,

vs.

THE JOURNAL COMPANY, HARRY J. GRANT and LAWRENCE C. EKLUND,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

RESPONDENTS' BRIEF OPPOSING REHEARING ON PETITION FOR WRIT OF CERTIORARI

On October 1, 1941, the petitioner presented a petition for a writ of certiorari to the Supreme Court of the State of Wisconsin to review a judgment of that court entered on May 20, 1941, and on which a rehearing was denied on July 7, 1941, affirming a judgment for the defendants in an action for libel entered in the Circuit Court for Milwaukee County, Wisconsin, on October 11, 1940, after the trial court had

changed the answers to two questions in a special verdict and ordered judgment notwithstanding the verdict.

The petition was denied on November 10, 1941, and the petitioner now seeks a rehearing.

I.

RELIEF NOW ASKED ON GROUND NOT CLAIMED IN ORIGINAL PETITION

The present petition is based on the claim of a denial of due process of law in violation of the Fourteenth Amendment (Pet. for Rehearing, p. 3).

Counsel say that they confine themselves "to the issues of 'due process of law' and the right of 'trial by jury.'" (Brf. on Rehearing, p. 9.)

No such claim was made in the original petition. Nor was it made in the supporting brief.

That petition was limited to the claim of a denial of equal protection of the law. That claim is not now made. It must be deemed abandoned.

The denial now asserted is a denial of a trial by jury (Pet. for Rehearing, p. 7).

II.

FEDERAL QUESTION NOT SEASONABLY RAISED

This question could have been raised at any of the following stages:

(1) in opposing the defendants' motions for a directed verdict (R. 145, C. 144; R. 447, Supp. C. 273);

(2) in opposing the defendants' alternative motions after the return of the verdict to change answers and

for judgment notwithstanding the verdict (R. 46-50, C. 45-49);

(3) on the order to show cause why the decision of the trial court as first announced should not be modified before the entry of a formal order (R. 55-64, C. 54-63);

(4) on the assignment of error required to be incorporated into the appellant's brief on the original presentation in the State Supreme Court; and

(5) on the petition in this court for a writ of certiorari.

At no one of these stages was the question raised. There was a failure (1) at three stages in the trial court, (2) at the initial stage in the State Supreme Court, and (3) at the initial stage in this Court.

All of this was fully covered in our brief opposing the granting of a writ of certiorari. It was not met in the petitioner's reply brief. It is not met now.

III.

ANALYSIS OF PETITIONER'S ARGUMENT

The petitioner argues eight points. On analysis, these eight points resolve themselves into three propositions:

(1) that under the Fourteenth Amendment, every party to an action at law is entitled to a trial by jury;

(2) that a state court may re-examine a fact passed upon by a jury only in the manner to which federal courts are restricted under the Seventh Amendment; and

(3) that in Wisconsin, the rights of a party to an action at law in respect to a trial by jury are fixed by the Northwest Territory Ordinance of 1787.

IV.

THE FOURTEENTH AMENDMENT DOES NOT CONTROL THE RIGHT TO A TRIAL BY JURY IN A STATE COURT

The Fourteenth Amendment neither guarantees any particular form or method of state court procedure, nor implies that all trials must be by jury. Consistently with the due process clause, trial by jury may be abolished. It is not essential to due process, either in civil or criminal cases.

Walker v. Sauvinet, 92 U. S. 90 (1876);

Iowa Central Railway Company v. Iowa, 160 U. S. 389, at 393 (1896);

Frank v. Mangum, 237 U. S. 309, at 340 (1915);

New York Central R. R. Co. v. White, 243 U. S. 188, at 208 (1917);

Hawkins v. Bleakly, 243 U. S. 210, at 216 (1917).

In *New York Central R. R. Co. v. White*, 243 U. S. 188, at 208, the Court said:

> [243 U. S. 208] " * * * The denial of a trial by jury is not inconsistent with 'due process.' "

In *Hawkins v. Bleakly*, 243 U. S. 210, at 216, the Court said:

> [243 U. S. 216] "Objection is made that the act dispenses with trial by jury. But it is settled that this is not embraced in the rights secured by the Fourteenth Amendment."

In *Iowa Central Railway Company v. Iowa*, 160 U. S. 389, at 394, the Court said:

> [160 U. S. 394] "It was not a denial of a right protected by the Constitution of the United States to refuse a jury trial, even though it were clearly erroneous to construe the laws of the State as justifying the refusal. *Brooks v. Missouri*, 124 U. S. 394; *Spies v. Illinois*, 123 U. S. 131, 166."

In Frank v. Mangum, 237 U. S. 309, at 340, the Court said:

> [237 U. S. 340] "* * * But repeated decisions of this court have put it beyond the range of further debate that the 'due process' clause of the Fourteenth Amendment has not the effect of imposing upon the States any particular form or mode of procedure, so long as the essential rights of notice and a hearing, or opportunity to be heard, before a competent tribunal are not interfered with. Indictment by grand jury is not essential to due process (*Hurtado v. California,* 110 U. S. 516, 532, 538; *Lem Woon v. Oregon,* 229 U. S. 586, 589, and cases cited). Trial by jury is not essential to it, either in civil cases (*Walker v. Sauvinet,* 92 U. S. 90), or in criminal (*Hallinger v. Davis,* 146 U. S. 314, 324; *Maxwell v. Dow,* 176 U. S. 581, 594, 602, 604)."

In our brief opposing the grant of a writ of certiorari, we stated, on the authority of *Abbott v. Tacoma Bank of Commerce,* 175 U. S. 409, at pages 413 and 414, that there could be no claim of a deprivation of property without due process of law, since an action of this character involves no property (Respondents' Brf., p. 6).

In the petitioner's reply brief, it was asserted that that case was distinguishable from the case at bar; but there was no attempt to point out a distinction (Reply Brf., p. 5).

The brief in support of the motion for rehearing contains no reference to that decision.

V.

THE SEVENTH AMENDMENT HAS NO APPLICATION TO STATE COURT ACTION

This Amendment applies only to courts sitting under the authority of the United States.

Pearson v. Yewdall, 95 U. S. 294, at 296 (1877);

Minn. & St. Louis R. R. v. Bombolis, 241 U. S. 211, at 217 (1916);

Ches. & Ohio Ry. v. Carnahan, 241 U. S. 241, at 242 (1916).

In *Pearson v. Yewdall,* 95 U. S. 294, the Court said:

> [95 U. S. 296] "* * * We have held over and over again that art. 7 of the amendments to the Constitution of the United States relating to trials by jury applies only to the courts of the United States, *Edwards v. Elliott,* 21 Wall. 557; and in the act of the General Assembly of Pennsylvania, now under consideration, amply provision is made for an inquiry as to damages before a competent court, and for a review of the proceedings of the court of original jurisdiction, upon appeal to the highest court of the State. This is due process of law, within the meaning of that term as used in the Federal Constitution."

The petitioner argues that the last clause of the Seventh Amendment applies to cases tried before a jury in a state court. That amendment relates to the manner in which a *federal court* may re-examine a fact tried by a jury.

It has no relationship to the manner in which a *state court* may so re-examine a fact. The federal courts are restricted to a course "according to the rules of the common law." The state courts are not so restricted.

The petitioner's error is apparent from his citation of *Chicago, Burlington, etc. R'd,* 166 U. S. 226. The court there was considering the restrictions imposed on the actions of a *federal court,* which are precisely the same whether the verdict under review was rendered in a state or in a federal court. No such restriction is imposed by the Seventh Amendment on the action of a state court.

At page 22 of his brief, petitioner quotes a portion of a paragraph in the decision last cited, commencing at page 242. In the balance of the paragraph, the Court in express terms points out the distinction between the examination of a jury

finding by the *courts of the United States* and the examination of such a finding by a *state court.*

VI.

NOTHING IN THE NORTHWEST TERRITORY ORDINANCE OF 1787 AFFECTS THE RIGHT TO A TRIAL BY JURY IN AN ACTION AT LAW IN WISCONSIN

The petitioner argues that the right to a jury trial must be determined under a compact contained in the Northwest Territory Ordinance of 1787.

The unsoundness of that argument has long been settled, and it cannot now be considered debatable.

The States formed out of the Northwest Territory entered the Union unrestricted by the terms of the Ordinance of 1787, except as adopted by State law.

Escanaba Company v. Chicago, 107 U. S. 678, at 688 (1882);

Sands v. Manistee River Improv. Co., 123 U. S. 288, at 296 (1887);

Willamette Iron Bridge Co. v. Hatch, 125 U. S. 1, at 9 (1888);

Cincinnati v. Louisville & N. R. Co., 223 U. S. 390, at 400 (1912).

VII.

PETITIONER'S CONCESSION THAT THE COURT HAD THE POWER TO DETERMINE WHETHER THE ARTICLE WAS CAPABLE OF A DEFAMATORY MEANING IS CONCLUSIVE AGAINST HIM

The Supreme Court of Wisconsin held that the proceedings following the return of the verdict were in accordance with the law of Wisconsin. In his original brief, petitioner argued that he was denied equal protection of the law be-

cause of a refusal to follow established Wisconsin practice. In his present brief, he abandons the claim of discrimination.

In his petition for rehearing, he expressly concedes the correctness of the statement that:

> "The court determines whether a communication is capable of a defamatory meaning while it is the function of the jury to determine whether a communication capable of a defamatory meaning was so understood by its recipient. (Sec. 614, Restatement of Defamation.)" (Pet. for Rehearing, p. 6.)

This, we submit, is conclusive against the petitioner. If the court determines that the language complained of is not capable of a defamatory meaning, there is nothing to go to the jury, and, under Wisconsin practice, it is for the court to make that determination at any time up to the entry of judgment.

Petitioner was not denied a trial by jury; he was permitted to adduce his evidence and examine all of the witnesses before a jury in the trial court. The action of the trial court was merely to rule that the evidence adduced was insufficient to support the jury's verdict which was that court's duty under the state law. (Respondents' Brf., pp. 11-18.)

VIII.

REVIEW OF ARGUMENT

The points argued in the brief in support of the petition for a rehearing will be reviewed in the order made.

POINT I, pages 10 and 11.

The petitioner argues that the right of trial by jury in actions at law is one of paramount importance and value. We have no quarrel with that, but it is not a matter in

respect to which the federal government has any supervision over the state governments. The three cases cited all relate to federal court action.

POINT II, pages 11 to 19.

Petitioner argues that he has been deprived of property without due process of law by a denial to him by the state courts of a trial by jury in violation of the Fourteenth Amendment.

This is answered in section IV, page 4, *supra.*

POINT III, pages 19 to 21

The petitioner argues that the right to a jury trial must be determined under a compact contained in the Northwest Territory Ordinance of 1787.

This is answered in section VI, page 7, *supra.*

POINT IV, page 21.

It is argued that the decision of the Wisconsin Supreme Court is in conflict with decisions of this court and of other state courts on the proposition that the denial of a trial by jury is not a denial of due process of law.

To quote from *Walker v. Sauvinet,* 92 U. S. 90, at 93 (Petitioner's Brief, p. 14):

> [92 U. S. 93] "Due process of law is process due according to the law of the land. This process in the States is regulated by the law of the State."

For the right to a jury trial, and for the respective functions of the court and the jury in a jury trial in a state court, we look to the laws of the state, whether embodied in the Constitution, the Statutes, or the evolution of the common law through state court decisions. The most casual reading of the decision of the Wisconsin Supreme Court in this case indicates that throughout this litigation, all of the proceedings followed the course of the established law of the

state. That was due process of law. The plaintiff had his day in court and was treated precisely as is any other litigant in any jury case, whether the nature of the action be libel or anything else.

POINT V, pages 22 and 23.

The petitioner argues that the last clause of the Seventh Amendment to the Federal Constitution applies to cases tried before a jury in a state court equally with those tried before a jury in a federal court.

This is answered in section V, page 5, *supra.*

POINT VI, page 24.

The petitioner argues that the courts of Wisconsin proceeded erroneously, precisely as if this case were not an action at law but a suit in equity. He is charging simple error, and not a violation of a constitution inhibition.

POINT VII, page 25.

The petitioner argues that if there is any credible evidence to sustain a finding of fact made by a jury in an action at law, the verdict of the jury must be permitted to stand.

The rule in this matter for state courts must be determined by the law of the state. The state is not bound to follow the decisions of this court in a matter of this kind. Even if there were error, that would not give this court any jurisdiction.

POINT VIII, pages 26 to 28.

The petitioner argues that he has not had a trial by jury. If the argument were sound, this court could be called upon to review for mere error every judgment of any state court in which the court directed a verdict, set aside a verdict, or rendered judgment notwithstanding the verdict.

The petitioner concedes the correctness of the rule of the Supreme Court of Wisconsin that the trial court must deter-

mine whether a communication is capable of a defamatory meaning (Petitioner's Brf., p. 6).

The jury, after finding a charge of crime, also found that the language complained of would naturally have been understood to charge him "with [such] neglect in the performance of his duty as mayor of the city to preserve the public peace and good order of the city, as to charge him with moral responsibility for the bombings."

[We have inserted in brackets the word "such." Through an error, it was omitted in the printed case. This is one of the matters that would call for correction if a writ were granted.]

The gist of the finding is that there was a charge of neglect of official duty. That placed it definitely in the field of comment, and placed the same stamp on the remaining answers; and the trial judge, acting strictly in accordance with the long established law of Wisconsin, entered judgment notwithstanding the verdict. This subject was fully covered in Respondents' Brief opposing the grant of the writ of certiorari at pages 11 to 18.

IX.

A PROPER CASE FOR A PENALTY

Whether a federal question is presented calls for concentration on an extremely narrow field. The duty clearly to point out the federal question rests on the petitioner. It is not fair to the Court or opposing counsel to compel them to work through a maze of unrelated matter, to search for what may be debatable, then to set up the hypothesis upon which an argument must be made, if at all, and then to demonstrate the fallacy of that argument.

The record in the State Supreme Court consisted of over 1,200 typewritten pages. The record here consists of 518 printed pages.

Neither the petition for a writ of certiorari, nor the supporting brief complied with the rules of this Court; and we were compelled to restate the matter in our brief opposing the granting of the writ. The defect is not supplied either in the present petition or in the supporting brief.

We have read and reread paragraph I of the petition for a rehearing (pp. 2 and 3). We respectfully submit that it has no place in this record.

It is clear that there is no violation of the Fourteenth Amendment. The petitioner made grave and serious charges both in his petition for review and in his supporting brief, asserting that he had been denied equal protection of the law through an arbitrary departure by the Wisconsin courts from the established and still existing law of Wisconsin (Respondents' Brf., p. 40). No considerations other than an orderly application of the state law motivated the Wisconsin courts. Petitioner withdrew his charges in his Reply Brief (Petitioner's Reply Brf., p. 3). The petition presents no meritorious or even debatable matter.

Under the circumstances we respectfully submit that this is a proper case for the imposition of a penalty against the petitioner. This was done in *Wagner Electric Manufacturing Company v. Lyndon, et al.*, 262 U. S. 226.

Respectfully submitted,

J. GILBERT HARDGROVE,
ROBERT P. HARLAND,
Counsel for Respondents.

MILLER, MACK & FAIRCHILD
Of Counsel.